

TRANSCRIPT OF RECORD.

66

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[REDACTED] 1920

No. [REDACTED] 85

LEWIS M. HAUPT, APPELLANT,

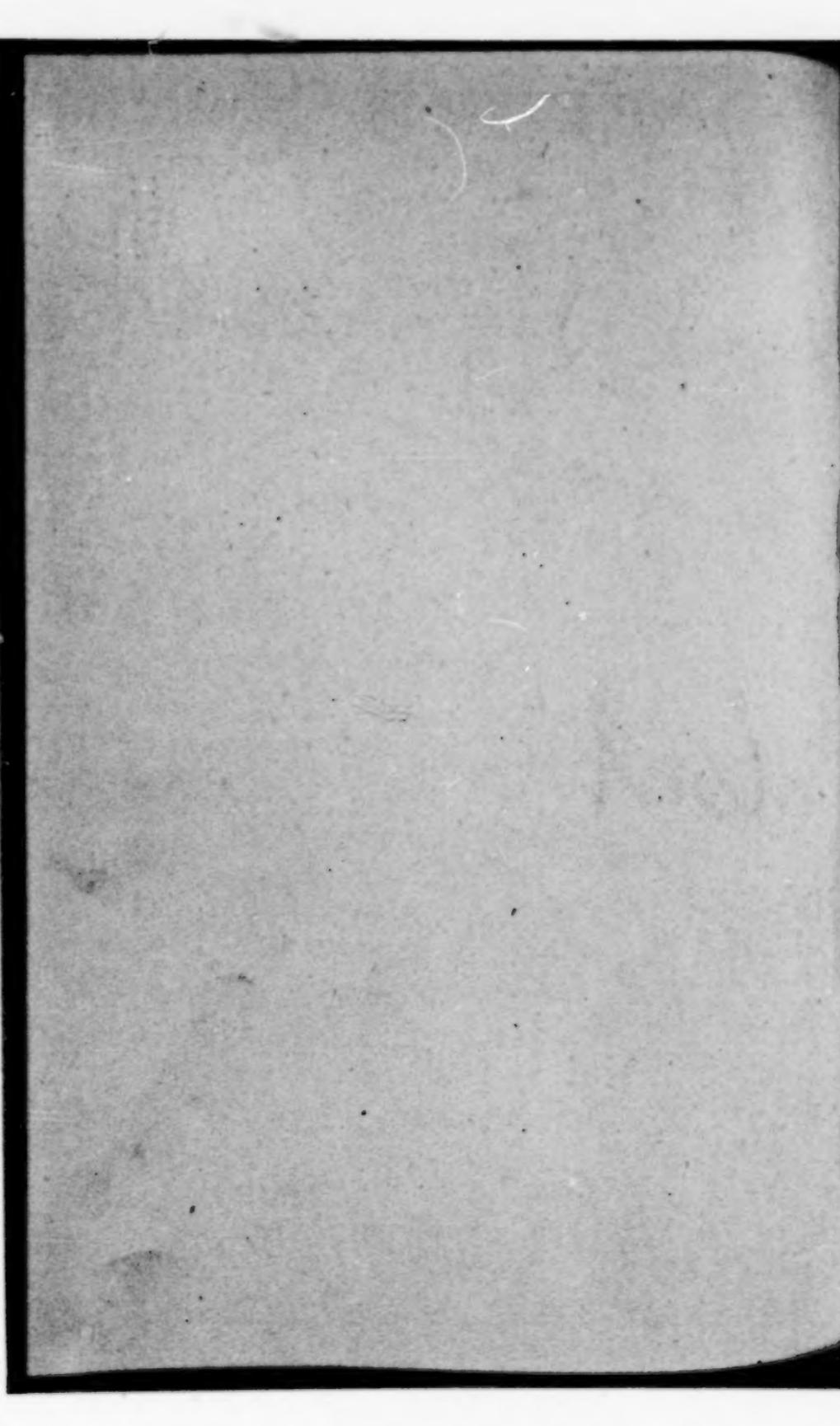
v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 29, 1919.

(27,032)



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Court of Claims.

No. 30,379.

Lewis M. HAUPT

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On April 19, 1909, the claimant filed his original petition.

Subsequently, to wit, on October 27, 1911, the claimant, by leave of court, filed his amended petition, which is as follows:

Amended Petition.

To the Honorable Chief Justice and Judges of the Court of Claims:

Petitioner, by leave of court, files this his amended petition and says:

I.

Petitioner is a citizen of the United States and of the State of Pennsylvania.

II.

On the third day of April, 1886, and the twenty-sixth day of November, 1901, letters patent of the United States were issued to petitioner for a novel and useful system of dikes, jetties and breakwaters, and a method of constructing the same, all designed by him. The function of said device was and is to develop or deepen channels in rivers and harbors. The design was novel, chiefly in that it proposed a curved jetty, by which the double service was to be performed of protecting the area of the intended channel from sediment and of causing such energy of currents as, by reaction along a concave directrix, to create and maintain the channel. All other designs on which jetties or breakwaters were under construction or provided for in rivers or harbors of the United States at the times of the issue of said patents and the other times herein-after stated called for two jetties, each much longer than the one jetty which would be required by petitioner's said plan at the same points respectively.

III.

Commencing in 1883, a number of attempts had been made by the United States Government and by private enterprises to secure a channel, navigable for ships of heavy draft, at Aransas Pass, Texas,

From 1880 to 1885 a part of one of two projected jetties was constructed in said harbor under an appropriation of Congress, which had been prompted by an estimate made by the Chief of Engineers of the Army that such two jetties could be constructed, to secure possibly 12 feet of water across an outer bar, at a cost of seven hundred fifty-nine thousand one hundred and eighty-five dollars (\$759,185). In such partial construction of one jetty and auxiliary work a total of five hundred and fifty thousand four hundred and sixteen dollars (\$550,416) was expended prior to June 30, 1886, and the normal depth of the channel at that position was not increased. These results were reported by the engineer in charge. In 1887 the engineers of said corps made a new estimate, which was communicated to Congress, in which the cost of a channel twenty (20) feet deep across said bar was put at two million fifty-two thousand five hundred and forty-three dollars and seventy-two cents (\$2,052,543.72). No further appropriation was made and no more work was done on said jetties, and before 1890 such part of the one

jetty as had been constructed was reported by the engineer in charge to have "disappeared," but at that time said structure remained in said inlet channel, being a serious detriment, rather than an aid, to the deepening of the channel. The improvement of said harbor and of others on the Texas coast was and is difficult because of the frequency and violence of storms and the prevalence of trade winds, and it was because of this difficulty and the expected great cost of the project the construction of said jetties was abandoned by Congress.

IV.

Commencing in the year 1890 and continuing its efforts intermittently through the years following, including 1898, the Aransas Pass Harbor Company, a private corporation, organized under the laws of the State of Texas, attempted, under authority and franchises granted by an act of Congress approved May 12, 1890, to create in said harbor an adequate channel for all sea-going vessels. On the failure of other plans which said company had tried, petitioner authorized its board of directors, on the condition that the construction be completed in ten months from that time, to build a jetty in said harbor in accordance with his patent. Said company thereupon caused the necessary surveys to be made and awarded contracts for the partial construction of a curved breakwater conforming with petitioner's said design. The construction so contracted for was accomplished, but said old jetty, which was found to be still in place, extending across the channel at depths of from 8 to 13 feet, prevented scour to 15 feet by the natural force of the currents, and the funds of said company were then exhausted and it was not able to complete the breakwater so planned. After conferences and correspondence with officers of the Engineer Corps of the United States Army, the directors of said company then agreed, on condition that Congress would make the necessary appropriations, commencing at its next session, and the United States would com-

4 plete the breakwater on said plan, to reconvey to the United States all its rights and franchises in and about the harbor and the work which had been constructed on said breakwater, and a deed to that effect was executed by the president of said company, acting under a resolution of the directors, on the twenty-seventh day of March, 1899.

V.

Petitioner, in writing, when informed of said negotiations between the directors of said company and the said officers of the Corps of Engineers, reminded said directors that said company could not convey any right to the use of his patent and notified them that he would not consent to any such conveyance. Said directors did not assert that they could convey any right to the use of said patent, and said deed of said company to the United States did not include any such right or mention said patent; nor has said company attempted in any other way to assign its said license.

VI.

The act of Congress approved March 3, 1899, making appropriations for the improvement of rivers and harbors, contained a paragraph in the words and figures below:

"Improving Aransas Pass, Texas.—For dredging and other improvements of Aransas Harbor, \$60,000: Provided, That the Secretary of War is hereby authorized to contract for the removal of that portion of the old Government jetty in said harbor from the end nearest the curved jetty constructed by the Aransas Pass Harbor Company to the wreck, 'Mary,' in such manner as to in no wise interfere with the curved jetty now located in said harbor; and provided further, That said contract shall not be let by the Secretary of War, nor said work done, until the said Aransas Pass Harbor Company shall have properly released and surrendered all rights and privileges heretofore granted to it in said harbor by Congress, also the jetty constructed in said harbor."

5 Said appropriation was applied, not to the removal of said old jetty or any part thereof, but to some additional work on said curved jetty. Said old jetty was in part broken up by blasting five years later, to wit, in the year 1904, but the stones composing the same have never been entirely removed from the channel, and they have continued to be and are still a detriment to the development of the same.

VII.

At the first session of the 57th Congress petitioner appeared at hearings both of the House Committee on Rivers and Harbors and the Senate Committee on Commerce, and pointed out that, to the end that the completed jetty should scour the channel to the desired depth in the shortest time, a little dredging, involving an expenditure of probably less than ten thousand dollars (\$10,000)

would be necessary at points which he indicated; and he then offered, if said dredging were permitted and said old jetty removed without longer delay, to complete the jetty and construct all auxiliary works, applying his patented design, for five hundred thousand dollars (\$500,000) and not to claim any royalty or other compensation for this application of his said design; this under bonds forfeiting all compensation on his failing to secure the depth promised. He also notified the committee that if Congress should not provide for the performance of said work by himself, but his patent and design should be adopted and the work done by the Corps of Engineers, or some other contractor under the direction of the army engineers, or if said old jetty should not be removed, he would not waive or surrender his right to compensation for such use of the patented design. It became manifest that said committee favored the adoption by Congress of petitioner's design and the completion of the jetty in conformance therewith, and thereupon the Chief of Engineers through an assistant recommended that the appropriation com-
plated for this purpose, like all those for other river and
6 harbor improvements, be put in control of the Secretary of
War and Chief of Engineers, to be applied to any contracts
that they might award, whether to petitioner or other bidders, and
promised that the Engineer Corps would cause the work to be done
on said design in good faith. Consenting to this recommendation,
the committee caused to be inserted in the pending appropriation
bill for the improvement of rivers and harbors a paragraph in the
words and figures below, and the same was a part of the bill as passed,
the act being approved June 13, 1892.

"Improving Aransas Pass, Texas. Continuing improvement \$250,000. Provided. That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company, and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current."

VIII.

The intention of Congress in making said appropriation and of the Corps of Engineers in using the same was that petitioner's said design should be strictly applied in the performance of the work. To this end Captain C. S. Rice, the District Engineer of the United States in charge at Galveston, Texas, when preparing specifications on which to invite bids for the work, consulted petitioner and adopted divers amendments which petitioner suggested and in the specifications as finally drawn said design was accurately incorporated. Bids were received under specifications so drawn and a contract was awarded to one Henry C. Ripley. Under said contract said Henry C. Ripley completed a considerable part of said jetty, his work terminating on September 17, 1891.

IX.

Such part of said curved jetty as remained to be constructed when said work of said Henry C. Ripley was completed was thereafter built under two appropriations of Congress. The first of said two appropriations was a clause, in the words and figures below, of the appropriation bill for the improvement of rivers and harbors approved March 3, 1887:

"Improving Aransas Pass, Texas.—Continuing improvement, \$100,000; Provided, That a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to prosecute said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate \$100,000, exclusive of the amounts herein and heretofore appropriated; Provided further, That the amounts herein appropriated and authorized shall be applied to the completion of the project in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done, and to such additional work as may be necessary for strengthening the jetty."

The second of said two appropriations, and the last required and made for the construction of said curved jetty, was made by a paragraph, in the words below, in the act of Congress approved June 30, 1888, making appropriations for sundry civil expenses of the Government.

"Improving Aransas Pass and Bay, Texas.—For continuing improvement of Aransas Pass in completion of contract authorization, \$100,000, to be applied to the construction of the project in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done, and to such additional work as may be necessary for strengthening the jetty."

Said remaining work for which said two appropriations were made was done by Clark and Company, a partnership, under a single contract. Between the work done by said partnership and that which had been done by said Henry C. Ripley there was a gap of uncompleted work until in the spring of 1886, but at said time said gap was closed and the work was completed in June of the same year.

X.

The act of Congress approved March 2, 1887, making appropriations for river and harbor improvements, contained a paragraph in the words below:

"Improving Harbor at Aransas Pass, Texas.—Continuing the improvement in accordance with the plans submitted in its report of December twenty-second, nineteen hundred and six, by the Board of Engineers created by authority of section three of the River and

Harbor Act of June thirteenth, nineteen hundred and two, two hundred thousand dollars. Provided, That the Secretary of War may enter into a contract or contracts for such materials and work as may be necessary to prosecute said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two hundred and ninety thousand dollars, exclusive of the amounts heretofore and heretofore appropriated."

Said plan of the Board of Engineers referred to in said appropriation of March 2, 1907, provided for the maintenance of said curved jetty, which was described in all the legislation on the subject as the "north" jetty, for the construction of a second jetty south of and opposite said reaction jetty, for the probable extension of both jetties a distance of one thousand seven hundred and fifty (1,750) feet for the construction of various auxiliary works and railroad trestles and tracks, and for a dredge, to create and maintain a channel,

The act of Congress approved May 27, 1908, making appropriations for sundry civil expenses of the Government, contained a paragraph in the words below:

"Improving Aransas Pass and Bay, Texas.—For continuing the improvement, two hundred thousand dollars."

The act of Congress approved March 4, 1909, making appropriations for sundry civil expenses of the Government, contained a paragraph in the words below:

"Improving Aransas Pass and Bay, Texas.—For continuing the improvement in completion of contract authorization, ninety thousand dollars."

Under said appropriations of March 2, 1907, and May 27, 1908, contracts were awarded for the work planned by said Board of Engineers, and a considerable part of the south jetty so designed has been constructed.

The cost of said works designed by said Board of Engineers was estimated by the board at one million two hundred and eighty-eight thousand six hundred and ninety-nine dollars (\$1,288,699), with seventy-five thousand dollars (\$75,000) per annum additional for the maintenance of the channel. In the performance of the work contracted for under said appropriations of March 2, 1907, and May 27, 1908, the full sum of two hundred thousand dollars (\$200,000) has been expended, and in the continuation of the work, as now planned by the Corps of Engineers, the full sum of ninety thousand dollars (\$90,000), appropriated in said act of March 4, 1909, will necessarily be expended. The contracts awarded under said appropriations did not provide for, and no work has ever been done on, said extensions of the jetties included in said design of the Board of Engineers as probable. The cost of said extensions would

be not less than one million three hundred thousand dollars (\$1,300,000).

XIII.

Even before said work of said Henry C. Ripley was completed said north jetty was deepening and widening the channel in said harbor and it continued to deepen and widen the same throughout said operations of said Henry C. Ripley and of Clark and Company. Said good results were much increased when said gap was closed by Clark and Company and the work completed. The effect of said jetty to this time has been constantly to deepen and widen the channel, but said good results have been counteracted to some extent by the influence of that portion of the south jetty which was constructed under said appropriation of March 2, 1897, and they have subsequently been counteracted in a greater degree by the influence of the larger construction completed on said jetty under said appropriation of May 27, 1898. Said results have also been and still are retarded in some degree by the remains of the old jetty, constructed before the adoption of petitioner's design, which has never been fully removed.

XIV.

Said patented design of petitioner had never been applied and has not yet been applied anywhere else but in said Aransas Pass Harbor, and its value has depended on a clear demonstration in said harbor of its utility. Congress was apprised of these facts when said appropriations were made, and the officers of the Corps of Engineers having authority in the premises were apprised of the same when said appropriations were utilized. By said operation of said south jetty the utility of petitioner's said design has been obscured and made subject to doubt and question, and thereby its value has been and is impaired to the amount of five hundred thousand dollars (\$500,000).

XV.

The construction called for in said plan of the Board of Engineers created by said act of Congress approved June 13, 1892 (following on and distinct from the construction already done by said Henry C. Ripley and said Clark and Company) will necessarily cost in the aggregate not less than one million seven hundred and fifty thousand dollars (\$1,750,000). Petitioner says that in so far as such construction has been accomplished it is a detriment, not an aid, to the development of the channel by said north jetty; that the structures specified by said board can never, in any event, accomplish the results for which petitioner's said design was adopted by Congress and which so far as it has had opportunity, it has accomplished, but that if such results can be accomplished by said plan of said board, constant dredging will be required to create and maintain the channel so sought, and that such dredging will cost forever, so long as such effort to maintain the channel is continued, not less than sixty thousand dollars (\$60,000) a year. Petitioner says further that, under the

offer made by himself to the 57th Congress, said north jetty would have been completed at a cost to the United States of five hundred thousand dollars (\$500,000), and he says that said jetty alone would have created and maintained the channel which was the object of said appropriations by the 57th Congress and later Congresses.

Petitioner prays judgment against the United States in the sum of one million seven hundred and fifty thousand dollars (\$1,750,000),

the same being the aggregate of the sums of (1) one million
12 two hundred and fifty thousand dollars (\$1,250,000), due to

him for the use of his said patented design recited in paragraphs VII to XIII, inclusive, and (2) five hundred thousand dollars (\$500,000) due to him for the impairment of the value of said patent recited in paragraph XIV hereof.

BENJ. CARTER,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *sue:*

Before me, Francis L. Neubeck, a notary public in and for said District, Benj. Carter, whose name is written as a part of the signature to the foregoing petition, made oath on this 26th day of October, 1911, that the allegations of said petition are true to the best of his knowledge, information, and belief.

BENJ. CARTER.

Subscribed and sworn to before me the day above written.

FRANCIS L. NEUBECK,
Notary Public.

II. *General Traverse.*

No. 30379.

LEWIS M. HAUPT

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *History of Proceedings.*

On May 22, 1917, the case was argued and submitted on merits by Messrs. P. M. Ashford, George W. Ramsey and Benjamin Carter, for the claimant, and by Messrs. W. D. Eakin and H. C. Workman, for the defendants.

On June 24, 1917, the court filed findings of fact and conclusion of law dismissing the petition and entered judgment against claimant in the sum of \$760.39 for the cost of printing the record in this court. *Opinion Per Curiam.*

On August 13, 1917, the claimant filed a motion for a new trial and for amendment of findings of fact.

On September 20, 1917, the defendants filed a motion to strike out claimant's motion for new trial and amendment of findings of fact.

On October 15, 1917, the claimant was allowed to withdraw former motion (filed August 13, 1917) and granted leave to file amended motion and given 10 days to file brief in support.

On October 15, 1917, the claimant filed an amended motion for a new trial and for amendment of findings of fact.

On October 26, 1917, claimant filed a motion for extension of time to file brief, which motion was allowed by the court October 27, 1917, and time extended to and including November 1, 1917.

On October 31, 1917, the defendants were allowed (in open court) to file motion to amend findings of fact. Said motion to be filed within 10 days from this date.

On November 10, 1917, the defendants filed a motion for amendment of findings.

On November 19, 1917, the court ordered the claimant's and defendants' motions to the Law Calendar and set same for hearing.

IV. *Argument and Submission of Motions.*

On April 2, 1918, the claimant's motion to amend findings and the defendants' motion to amend findings were argued and submitted by Messrs. Benjamin Carter and G. W. Ramsey, for the claimant, and by Mr. W. D. Eakin, for the defendants.

14 V. *Ruling of Court on Motions to Amend Findings.*

On June 17, 1918, the court allowed in part and overruled in part the claimant's and defendants' motions for amendment of findings of fact. Former findings of fact, conclusion of law and opinion were withdrawn and new findings of fact, conclusion of law and opinion were this day filed which are as follows:

15 VI. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Booth, J.*

Entered June 17, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following:

Findings of Fact.

I.

The plaintiff, Lewis M. Haupt, is a citizen of the United States and a resident of the city of Philadelphia, Pa. He was graduated from West Point Military Academy in 1867, as a member of the Corps of Engineers, and served in the United States Army for about

two years; since which time he has been connected with the United States Patent Office as an assistant examiner, has been professor of civil engineering in the University of Pennsylvania, and for more than 40 years past has been engaged in practice as a consulting and civil engineer, and has made a special study of the subject of the improvement of harbors and navigable rivers.

II.

On December 13, 1887, the plaintiff filed in the United States Patent Office an application for letters patent for certain alleged improvements in dikes and breakwaters; and on April 3, 1888, United States Letters Patent No. 380,569 were granted him upon said application. A copy of said patent is set forth in the appendix to these findings of fact.

The claims of said application, as originally filed, were as follows:

"1. A breakwater or dike composed of a combination of curves, or of curves and right lines, so arranged as to resist and decompose the flood resultant over a portion of the outer bar, and at the same time to permit the free ingress of the tidal prism to the inner basin, substantially as described."

"2. The breakwater herein described having one end angularly approaching, but disconnected from the shore, to produce a reaction and compression upon that part of the flood intended to scour out and maintain the beach channel, substantially as set forth."

16 "3. A breakwater comprising one or more curves having their cusps or salients placed so as to cut the advancing wave and resolve them into components along the concave faces of the structure, substantially as described."

"4. A breakwater for improving the channels of rivers and harbors, said breakwater consisting of one or more semiellipses having at the shore end a straight or approximately straight flank, substantially as described."

"5. A dike for improving channels, composed of compound or reverse curves disposed to withdraw a part of the current from one channel and divert it into another, substantially as described."

"6. A reaction dike composed of compound or reverse curves, disconnected from the main shore lines and so disposed as to divert part of the current force from one channel into another, substantially as described."

"7. The combination of the breakwater composed of a series of intersecting arcs and a straight or slightly curved flank, and the dike composed of compound or reverse curves for conserving the energy of the inner forces, substantially as described."

On February 11, 1888, action was taken by the Patent Office on said application and claims, by letter to the applicant, as follows:

"This case has been examined. In regard to the 1st claim, 'combination of curves or curves and right lines,' apparently renders the claim alternative; there is also an uncertainty as to the meaning of said phrase. Does it mean on the one hand a combination of curves B, B' & B'', or on the other hand a combination of the curves B, B', B'', & F (B'' F' being described in specification as sometimes slightly curved) or of curves and right lines B, B', B'', F'? This uncertainty should be cleared up. The second claim appears to be substantially met by works of Douglas Harbor, A Treatise on Harbors by 'Rennie,' Vol. II, page 185, a copy of which can be found in the Congressional Library; see also 2nd paragraph, page 77, Harbors & Docks-Harbors-Pat. Office Library. Claims 5 & 6 are met in Reports of Chief Engineer, Part II, of 1877, sheet of drawings following page 1031 Buena-Vista Bar, Part I of 1878, page 796, Part I of 1885, page 696, Dyke on Bear Island, and Part I of 1876, page 710, sheets of drawings Nos. 9, 11, 13, 14, & 19, Improvements of the Tennessee River."

The Patent Office citations above against claims 5 and 6 showed dikes composed of compound or reverse curves and disposed as specified in said claims.

In response to said action of the Patent Office the applicant, on February 25, 1888, amended by introducing, as a new claim, claim 2 of the patent, and by amending claims 1, 2, 3, 4, 5, 6, and 7 of the application to number and read, respectively, as claims 1, 3, 4, 5, 6, 7, and 8 of the patent as granted.

In response to these amendments of the applicant, the Patent Office on March 10, 1888, took action as follows:

"Case has been reconsidered in connection with amendment of Feb. 25. The 1st & 2nd claims differ from each other only in that the 1st calls for a breakwater formed of a combination of curves, the other with combination of curves and right lines. This renders the two alternative in form at least. The claims should not be dependent on reference to the specification to avoid that objection. If it is in the 1st claim to cover the series of intersecting curves not including the flanks which approaches the shore would not the claim read better as follows after water level (having the form of a series of intersecting arcs having their cusps or salients so placed as to cut the advancing waves (see page 5 line 6 & 7), and to resist and decompose the flood resultant, &c.). If it is intended to include the flanks approaching the shore, then the 1st & 2nd claims are actually alternative. The remaining claims, as far as present advised, are in condition for allowance."

On March 13, 1888, the applicant responded to the above action of the Patent Office as follows:

"The official letter of the 10th inst. has been received. It is thought that there is no conflict between claims 1 and 2, and that they do not exclude each other, as suggested. Claim 1 is designed to be sufficiently comprehensive in scope to cover the improved break-

water composed of a series of curves, whether or not the reaction flank is employed as an adjunct. Claim 2 includes such flank in terms. Claim 1 is therefore generic, and claim 2 specific. A reconsideration is requested."

The claims as theretofore amended were therupon allowed by the Patent Office, and the patent duly issued.

Said letters patent expired by limitation April 3, 1907. By his deed of June 7, 1902, recorded in the Patent Office June 9, 1902, plaintiff assigned said patent to the Reaction Jetty Company, excepting only his "right, title, and interest in and to the work already done or to be done at Aransas Pass, in the State of Texas." The patent was not reassigned to him.

III.

Aransas Pass is an inlet connecting the waters of the Gulf of Mexico proper and those of Aransas Bay and the Bay of Corpus Christi on the coast of Texas. As early as 1854 the subject of developing a channel in said Pass sufficient to permit navigation was agitated. From 1854 to 1880 little or no work was done toward that end. In 1869 a private company built a short hurdle about 600 feet long, extending from the north shore of the Pass, which produced a temporary deepening of the channel in the Pass of about 2 feet. By 1871, however, this work had apparently disappeared, for an examination made about that time by Lieut. Woodruff, of the Engineer Corps of the United States Army, found no trace of it. Nothing more was done until about 1880, between which time and 1885 there was constructed by the Federal Government, aided by a small subscription made by the citizens of Rockport and Corpus Christi, about 5,500 feet of jetty, of which 1,500 feet was on shore. This was known as the "Mansfield" jetty. It had no appreciable effect upon the channel, and by 1888 the curved portion of the jetty had practically disappeared.

In 1888 Maj. Ernst, who succeeded Maj. Mansfield as United States engineer for said district, recommended an appropriation of something over \$2,000,000 for the construction of two jetties 2,000 feet apart. Work was continued under appropriation made by Congress, on the "two-jetties" plan, by extending the so-called Mansfield jetty from a point beginning near the "wreck Mary," and running out to sea on a curved line. After about \$550,000 had been expended on this project work was suspended in 1889 on account of the adoption by Congress of a proposition submitted by a special board on the subject of Texas inlets, which recommended the suspension of all projects for improvement of the harbors on the Texas coast except that at Galveston.

IV.

On March 22, 1890, the State of Texas chartered the Aransas Pass Harbor Co., a private corporation organized for the purpose, among other things, of improving the channel at Aransas Pass.

By an act passed May 12, 1890, 26 Stats., 105, Congress granted to the said Aransas Pass Harbor Co., a franchise to open Aransas Pass on the coast of that State to a depth of 20 feet. Said act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Aransas Pass Harbor Company, a corporation duly chartered under the laws of the State of Texas, and their associates, assigns, successors, and representatives be, and they are hereby, authorized on the conditions hereinafter mentioned, to construct, own, and operate such permanent and sufficient jetties and breakwaters and such auxiliary works as are necessary to create and permanently maintain, as hereinafter set forth, a navigable channel across the outer bar, which obstructs the entrance to Aransas Pass Harbor, on the coast of the Gulf of Mexico, in the State of Texas, and so far into the bays and navigable waters as may be necessary to reach a place that will afford ample dockage and protection from storms, swells, cyclones, and tidal waves for the purpose of furnishing the vessels and boats adapted to the purpose, facilities for navigation in and along the entire length of said channel, and for that purpose they may construct in the Gulf of Mexico and in and across the bays and navigable waters adjacent thereto such walls, jetties, dikes, levees, and other structures, and employ such boats, rafts, bridges, and appliances, as they may in the prosecution of said work deem necessary: Provided, That no such structure or means employed shall hinder, delay, or interfere with the free navigation in said channel, harbor, bays, or navigable waters; and to protect their said works they may build and maintain such levees, embankments, walls, or riprap as may be necessary to secure their permanency along the banks or shores of Mustang, Saint Joseph, and Harbor Islands as the United States is authorized to grant, and to utilize such works as the Government has already constructed, and will hold the United States harmless from any damage that may accrue to any person or persons by the construction of said walls, jetties, dikes, levees, and other works constructed thereunder: Provided further, That unless the construction of the proposed work shall be commenced within one year from 19 the date of the approval of this act and be diligently prosecuted by the expenditure of at least \$300,000 per annum thereafter in the prosecution thereof until twenty feet depth of water over the outer bar is obtained, the grant of privileges herein shall be forfeited; and unless the said company, their associates, assigns, successors, or legal representatives, shall secure a navigable depth over said outer bar of fifteen feet of water within three years after the date of the approval of this act, and a navigable depth of twenty feet of water over said bar within five years from said date, then Congress may revoke the privileges herein granted in relation to said improvements.

"See, 2. That at any time after said improvements and auxiliary works have been completed as herein provided, and said depth of twenty feet has been obtained, the United States shall have the right

to pay the said company, or their assigns, successors, or legal representatives, the value of the works constructed under this act or under or by virtue of any authority granted by the State of Texas, and on such payment being made by the United States all rights to said work on the part of said parties shall cease, but nothing in this act shall be construed as compelling the Government to take possession of and pay for said works unless so desired. Nothing within the provisions of this act shall be construed as authorizing the said company to charge or collect tolls or tonnage upon boats or vessels navigating said channel and the navigation of the same shall be free."

Said company began work on March 2, 1892, on a jetty known as the "Nelson Jetty," composed of wooden caissons, filled with sand, built out from Mustang Island for a distance of about 1,800 feet. It failed to deepen the channel and was abandoned about August 1, 1893, after about \$107,000 had been expended on it. It was later destroyed by action of the waves of the sea.

Upon a failure of the harbor company to meet certain requirements of said act Congress, on January 22, 1894, 28 Stat., 26, passed an act as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Aransas Pass Harbor Company, which is engaged in the improvement of Aransas Pass under the provisions contained in an act of Congress entitled 'An act for the improvement of Aransas Pass,' approved May twelfth, eighteen hundred and ninety, is hereby relieved from the conditions of said act which require the construction of said work to be commenced within one year from the date of its approval and to be diligently prosecuted by the expenditure of at least \$300,000 per annum thereafter, and to secure a navigable depth over the outer bar of fifteen feet of water within three years after the date of approval of said act, and of twenty feet within five years from said date; and the said company is hereby authorized to continue and complete its work of improvement as set forth in said act: Provided, That work shall be resumed by the said Aransas Pass Harbor Company within six months from the date of approval of this act, and shall be diligently prosecuted to completion, and said company shall secure a navigable depth over the outer bar of at least twenty feet of water within two years from the date of approval of this act. And in the event of said company failing to resume said work within the said six months, or failing to diligently prosecute the same, or to secure a navigable depth of twenty feet of water over the outer bar within the time required by this act, then Congress may revoke the privileges herein granted in relation to said improvement.

"See, 2. That the right of Congress to alter, amend, or repeal this act is hereby reserved."

V.

After the building of said unsuccessful jetty, which was later destroyed, said harbor company was reorganized under the same name,

Plaintiff granted to the new company the privilege of using his patented device on condition that the work be done under his supervision. Said new company proceeded under the said act of January 22, 1894. Plaintiff prepared the plans and drawings. Said company looked upon the plan of work as in the nature of an experiment and was unwilling and financially unable to expend any more than was absolutely necessary to make a demonstration of the plan. They therefore concluded that they would build only about one-half of the designed breakwater to determine its utility. Thereupon the company called upon plaintiff to eliminate part of his specification and he did eliminate a portion, though he considered that it would be a detriment to his plan to do so. The estimated cost was cut in half before the company would consent to start the work. Included in the portion eliminated was the "flank" hereafter mentioned. On July 3, 1895, said company contracted with Charles Clarke & Co., of Galveston, for the construction by the latter of a single curved jetty in accordance with the modified plans, drawings, and specifications prepared and furnished by the claimant, as above stated, and to be located on the site selected by him. The plaintiff had recommended a dike in the form of a compound or reverse curve, with a slightly curved flank at the inshore end, which left the main jetty at an angle and ran nearly parallel with the then shore of St. Joseph Island at a distance of several hundred feet from it. The purpose of said flank, according to plaintiff's plan, was to prevent cross currents and to concentrate the flood tide as it entered, and also to control more fully the ebb currents and direct them tangentially against the concave portion of the jetty, and thus increase their scouring efficiency. It was an important element in the plan as designed by claimant and was included in the portion eliminated by him, as above stated. It was never built. As hereafter shown, the space between the inner end of the jetty and the shore was subsequently closed.

When the new Aransas Pass company was organized, it was agreed that the plaintiff and another engineer should each receive \$1,000, of which \$500 was to be payable to each on obtaining 15 feet in depth and the balance on obtaining 20 feet in depth of the channel, and that was to be the entire consideration for the work of claimant. The company was not to pay anything for the use of the patent or for preparing the plans. No time limit was stated, and payment was contingent upon said results. The plaintiff did not expect anything in the way of compensation from the company for the use of the patent; his desire was to obtain the benefit of an early demonstration of the same. The plaintiff received only one of said \$500 payments, and that was made by the Aransas Pass Harbor Co. after its conveyance of the work to the Government had been made, as hereafter mentioned, in 1899.

21 The work of construction under the Clarke & Co. contract was vigorously prosecuted until January 22, 1896.

VI.

During or shortly after the work done by Clarke & Co., it was discovered that the Mansfield Jetty, which extended out from Mustang Island, had not disappeared, as officially reported, to sufficient depth to permit free erosion by the currents, the said jetty acting as a "sill" across the proposed channel. A contract was therefore entered into by and between said harbor company and Col. C. T. Goodyear about the 1st of September 1896, for the removal, by blasting, of a small part of the obstructing Mansfield Jetty and for the completion of the breakwater begun by Clarke & Co.

In May following, to wit, 1897, before either of the said objects had been accomplished, work was suspended under the Goodyear contract.

VII.

On May 28, 1898, the Senate concurred in a resolution adopted by the House of Representatives May 26, 1898, providing as follows:

"That the Secretary of War be, and he is hereby, authorized and directed to prepare and submit plans, specifications, and estimates for the improvement of Aransas Pass Harbor, State of Texas, and especially to make plans and estimates for the removal of the sand bar at Aransas Pass and the deepening of the channel across said bar to a depth of at least twenty feet and a width of at least one hundred and fifty feet at the bottom, so as to furnish an inlet for the passage of vessels from the Gulf of Mexico into Aransas Harbor; and report such plans to Congress and also whether in his judgment such improvement should be made."

A board was created by the War Department to act in accordance with said resolution. It reported on December 30, 1898, that it would be advisable to build two parallel jetties and to have recourse to dredging; that the north jetty be located essentially upon the line of the jetty partially constructed by the Aransas Pass Harbor Co., and the south jetty be constructed about 1,200 feet south thereof; that a portion of the old Government Jetty and outer 1,000 feet of foundation of the Aransas Pass Harbor Co.'s Jetty should be removed in any case. The board estimated making the bottom width 300 feet. In the meantime the plaintiff had brought to the attention of different members of Congress his plan, and when the report of said board was submitted and its recommendations were before the House Committee on Rivers and Harbors early in 1899 the plaintiff was requested by the chairman, Hon. Theodore E. Burton, to submit his proposition relative to said improvement. Plaintiff submitted a proposition to the committee to complete the work at Aransas Pass by creating a 20-foot channel 100 feet wide for \$700,000, which was greatly less than the amount estimated by said board to be necessary for the work recommended by them. The plaintiff offered to make a bond for the successful completion of the work. A subcommittee was appointed to consider his proposition, and the same was put in

writing, accompanied by a bond. About that time a proposition was received by the subcommittee from the War Department proposing to secure a channel by dredging alone at a cost of \$100,000 without any guarantee as to the maintenance of the channel. The committee rejected plaintiff's offer and subsequently invited him to a meeting, and assured him that they were desirous of giving his plan a trial and were disposed to recommend an appropriation for the removal of the old Mansfield Jetty, which plaintiff claimed furnished an obstruction to the operation of his curved jetty. He was asked to make an estimate as to the cost of the removal of the Mansfield Jetty, and he placed the price at \$50,000.

VIII.

By the act making appropriations for rivers and harbors approved March 3, 1899, 30 Stats., 1121, 1128, \$60,000 was appropriated for dredging and improving Aransas Pass Harbor under the following conditions:

"Provided, That the Secretary of War is hereby authorized to contract for the removal of that portion of the old Government jetty in said harbor from the end nearest the curved jetty, constructed by the Aransas Pass Harbor Company, to the wreck Mary, in such manner as to in no wise interfere with the curved jetty now located in said harbor; And provided further, That said work shall not be let by the Secretary of War nor said work done until the said Aransas Pass Harbor Company shall have properly released and surrendered all rights and privileges heretofore granted to it in said harbor by Congress, also the jetty constructed in said harbor."

Said appropriation was not expended for the purpose of removing the old Mansfield Jetty and was chiefly used in 1901 and 1902 to build up the inner portion of the jetty in a manner that was considered harmful by plaintiff and not in accordance with his recommendation.

Prior to the passage of said appropriation bill of 1899 the board of directors of the Aransas Pass Harbor Co., on the 16th day of December, 1898, passed the following resolution:

"Be it resolved, That the Aransas Pass Harbor Company hereby releases to the United States Government all its rights and franchises received from said Government to secure deep water at Aransas Pass, Texas; and be it

"Further resolved, That said company convey to the United States Government the stone breakwater which it has constructed at said pass of Aransas in its efforts to secure deep water, provided that the United States Government take control of the improvement at Aransas Pass and make an appropriation at this session of Congress to prosecute the work in securing water across the bar at said Aransas Pass."

Said resolution was, on the 2d day of January, 1899, brought be-

fore a meeting of the stockholders of said harbor company, and they ratified and approved the said resolution of the directors. They authorized the president of the company to make conveyances of the franchises and property described in said resolution to the United States Government in accordance with said resolution, provided that the United States Government take control of the improvements at Aransas Pass "and make an appropriation at this session of Congress to prosecute the work in securing deep water across the bar at said Aransas Pass."

23. After the passage of said resolutions of the directors and stockholders and after the said act of March 3, 1899, a conveyance was made by the said Aransas Pass Harbor Co. to the United States reciting the said resolutions of the board of directors and stockholders, and further reciting that by provision in the said act of March 3, 1899, the Government of the United States had taken control of the improvement at said Aransas Pass and made an appropriation to prosecute the same with a view of securing deep water across the bar at said pass, and that in consideration thereof and other good and valuable considerations the said Aransas Pass Harbor Co. granted, conveyed, released and surrendered unto the United States of America all the rights, franchises, and privileges in the said harbor at said Aransas Pass theretofore granted to said company by Congress, together with the jetty constructed in said harbor and the stone breakwater erected by said company at said pass. Said conveyance was executed on the 27th day of March, 1899.

When plaintiff got information of the intention of the harbor company to turn everything over to the Government he addressed a letter to the Aransas Pass Harbor Co. in 1899 warning them against transferring his patent rights. Later in 1901, plaintiff wrote a letter to Charles Clarke & Co. notifying them that the plan of work adopted by said harbor company was patented, and requested them to take that into consideration in their bid. To this letter they replied that they had made no allowance in their bid for any patented rights and that their contract merely called for repairing the Aransas Pass breakwater. He also wrote to the chairman of the Committee on Rivers and Harbors of the House and the Senate that the right to use the plans, specifications, and designs furnished by him to said company was a personal one granted by him to said company and was not subject to transfer to the United States by it.

On the 7th day of June, 1902, the plaintiff duly assigned by an instrument in writing recorded in the Patent Office to the Rector Jetty Co. all of its right, title, and interest in and to Letters Patent No. 380,569, bearing date April 3, 1888, and Letters Patent No. 687,367, bearing date November 26, 1901, excepting only his right, title, and interest in and to the work already done or to be done at the Aransas Pass, in the State of Texas, under these patents."

IX.

By the act making appropriations for rivers and harbors approved June 13, 1902, 32 Stats., 331, \$10, \$250,000 was appropriated for

continuing the improvement at Aransas Pass under the following conditions:

"Provided, That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore carried out on said jetty by said company, and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the currents."

21 While the bill for said jetty was under consideration in the committee the plaintiff appeared before the House committee and renewed his proposition to complete the work and guarantee a channel, stating that in view of the work done by Clarke & Co. he would do the work for \$500,000. The House committee did not accede to his proposition, and he renewed it before the Senate committee having the bill in charge. Brig. Gen. McKenney, Assistant Chief of Engineers of the Army, also appeared before the Senate committee and urged that a contract be not made directly with any contractor, but stated to the committee that if it were desirous to test the Haupt plan the War Department would be glad to see that a fair trial was given to it.

When making his proposition to complete the work for \$500,000 plaintiff stated to the committee that if he were given the contract he would charge no royalty and expect no compensation for the use of his patent, but that otherwise he would expect something for the work of development and the use of the patent. At that time plaintiff was promoting and offering for sale the stock of the corporation to which his letters patent had been assigned, as above stated. He desired that a demonstration of his patent be made.

X.

On April 29, 1903, a contract was entered into between the United States and one Henry C. Ripley for construction work on said jetty. The plans, drawings, and specifications for the work had been prepared by the Government engineer in charge and were by him submitted to the Aransas Pass Harbor Co. and to their consulting engineers, one of whom was plaintiff. The latter suggested amendments to the specifications, which were later adopted. The specifications attached to the Ripley contract conformed substantially to the plans, drawings, and specifications which had been prepared by plaintiff for said harbor company and used by it (with the exception of the modifications stated in Finding V). Said contract with Ripley contained a clause by which he agreed to indemnify the United States against any claim for the use of any patented invention. After the completion of this contract there were about 1,600 linear feet of the middle portion of the said jetty which had not been brought to the

same height as the end portions were, and some of the 1,600 feet were below low water. The plaintiff gave Ripley financial backing under an agreement that it should be repaid.

About the same time that the contract with Ripley was made, a contract was entered into between the United States and Moors & Seiber for the removal of certain portions of the said Mansfield Jetty, and about 800 feet of the same were removed by them to a depth of 25 feet. There yet remained on the site of the Mansfield Jetty some loose rock.

XI.

By the *act making appropriations for rivers and harbors*, approved March 3, 1885, 33 Stats., 1117, 1136, Congress appropriated \$100,000 for continuing the improvement at Aransas Pass and authorized contracts to be entered into for an additional sum, not to exceed \$100,000, thereafter upon the following conditions:

"That the amounts herein appropriated and authorized shall be applied to the completion of the project in accordance with 2. the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore done, and to such additional work as may be necessary for strengthening the jetty."

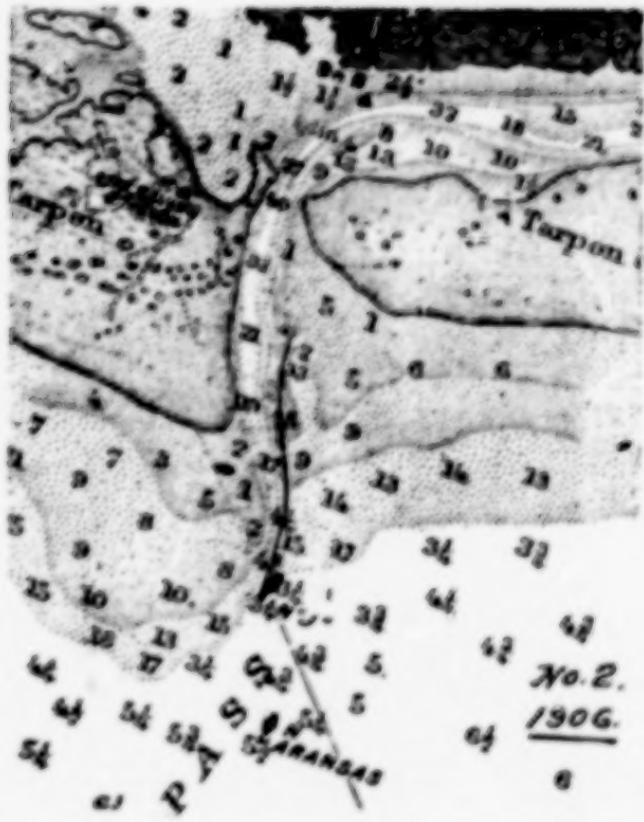
XII.

A contract was therupon duly entered into by the United States with Clarke & Co. for the continuation of the work of constructing a curved jetty in accordance with the design and specifications which had been prepared for the Ripley contract. Later, to wit, June 30, 1886, Congress appropriated the \$100,000 authorized in the *act of March 3, 1885* for the continuation of the improvement of Aransas Pass, with the condition attached to said appropriation that it was to be applied to the construction of the project in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done, and to such additional work as may be necessary for strengthening the jetty. 34 Stats., 737.

Under contracts in compliance with the provisions of said acts Clarke & Co. continued the work of said improvement, which was completed by the end of March, 1886, making the total length of the jetty 3,750 feet.

XIII.

In December, 1886, a board appointed by the War Department to further consider the Aransas Pass project recommended that the inlet between the so-called Haupt Jetty and St. Joseph's Island be closed up and that a parallel jetty be built along the south side of said jetty, making the project one of twin jetties.



XIV.

By the act making appropriations for rivers and harbors approved March 2, 1907, 34 Stats., 1073, 1091, Congress appropriated \$200,000 and authorized contracts to be entered into for an additional amount of \$290,000 for improving the harbor at Aransas Pass upon the following conditions:

"Continuing improvement in accordance with the plans submitted in its report of December twenty-second, nineteen hundred and six, by the Board of Engineers, created by authority of section 3 of the Rivers and Harbors Act of June thirteenth, nineteen hundred and two."

Carrying out the purpose of said act of March 2, 1907, contracts were made by the proper officers of the War Department with sundry individuals under which the gap between the inner end of the jetty and the shore was closed. The structure which served to close said gap extended from the said jetty at a point about where the flank originally designed by claimant was to start. Said inner gap was closed between July, 1908, and February 27, 1909. Under the contracts made under the act of March 2, 1907, a jetty generally parallel to the so-called Haupt Jetty was built out from Mustang Island into the sea, a distance of some hundreds of feet farther than the outer end of said Haupt Jetty. The said south jetty was begun 26 in March, 1908, and completed in April, 1911. There was no contract with reference to any changes in the said curved jetty. In the years 1914 and 1915, under a revised plan of the Army engineers adopted in 1913, the south jetty has been built farther out.

XV.

The plan of jetty begun by the said harbor company in 1895 and the construction work thereon by said company, and subsequently by the United States until its completion in March, 1906, prior to the change of the plan to twin jetties, were in accordance with the modified plan and specifications furnished said company by the plaintiff and approved by the company, as aforesaid, which plan omitted the flank originally included in the claimant's plan as shown by Finding V.

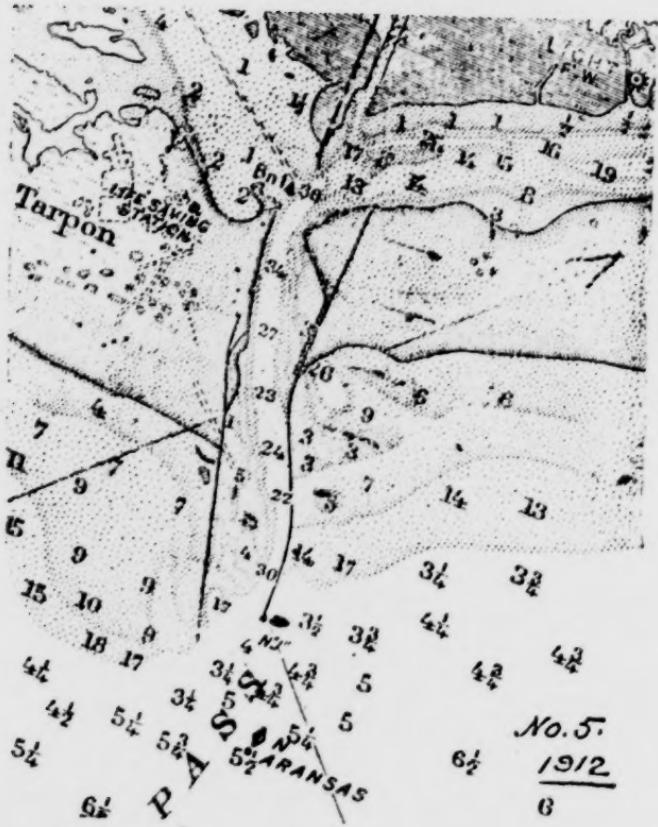
The location and shape of said jetty as actually constructed is shown by the following cut, the general course of the jetty being southeasterly from the inshore end thereof:

(Here follows drawing marked page 26.)

Said jetty, as so constructed, did not embody any of the devices of the plaintiff's said Letters Patent No. 380569.

The twin jetties plan adopted and carried out by the United States, as set forth in Finding XIV, is shown by the following illustration, of date 1912, in which the southeasterly point of St. Joseph Island, as compared with its position in the illustration in Finding XV, has been extended by sand drift or fill out to near the point of the inner end of the said harbor company reverse curve jetty.

(Here follows drawing marked page 27.)



XVII.

At the time of the filing of the plaintiff's said application for patent there were in the art to which said application related curved dikes or breakwaters concave to the current, and compound or reverse curve dikes or breakwaters of the general character and form of the said dike or jetty constructed by said Aransas Pass Harbor Company and the United States as set forth in Finding XV above.

Among the disclosures of the prior art there were, in addition to those cited by the Patent Office against original claims 5 and 6 of the plaintiff's said application for patent, as shown by Finding 28 H, the following, which are shown by Exhibits, A, B, C, D, E, and F accompanying and forming a part of these findings of fact.

A reverse curve dike or breakwater in Wilmington Harbor, California, between Deadmans Island and Rattlesnake Island. Exhibit A.

Curved dikes or jetties at Senegal Bar, Africa. Exhibit B.

The Mansfield Jetty at Aransas Pass, Texas, shown by Exhibit C, and also by Exhibit D, in the latter of which it is noted as the "old government jetty," and the outer and curved portion of which was removed to prevent interference by it with the operation of the harbor company reverse curve jetty.

Curved dikes or jetties at Swinemunde Harbor, Germany. Exhibit E.

United States Patent No. 283683, to Thomas, August 21, 1883, for breakwater. Exhibit F.

XVIII.

From 1854 to the end of 1895, the channel at Aransas Pass drifted more than a mile from northeast to southwest, with diminishing depths as it progressed. The reverse curve jetty begun by the Aransas Pass Harbor Company in June, 1896, was completed by the United States in March, 1906, by the closing of a gap of about 1,600 feet in said jetty. Through this gap there was a flow and ebb of the tide. During said period from 1896 to 1906 the depth and width of the channel were variable and shifting. Alongside and near the jetty, in the curve concave to the current, there were frequently depths of more than 20 feet, occurring at irregular distances, and of varying widths, and too narrow for regular navigation. Since 1906 the depths have increased. In 1908 the ruling depth of the channel 100 feet wide was 6 feet.

Beginning in the year 1912, coastwise and seagoing vessels have been going through said pass, and in that year the Texas Railway Commission gave Aransas Pass the status of a commercial port, fixed railroad rates for it on the basis of water competition, and in so doing put it on a par with Galveston. Dredging was necessarily done in the years 1912 and 1915, inclusive, to maintain a proper navigable depth of channel in the pass.

XIX.

The evidence does not show to the satisfaction of the court that the so-called Haupt Jetty, which was constructed as aforesaid, did produce or would have produced a navigable channel of the necessary or proper depth and width for navigation purposes. The evidence shows that since the construction of the parallel jetty on the south and the dredging in the channel by the Government a navigable channel has been produced.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the evidence fails to establish a contract, either express or implied, between the plaintiff and the United States for the use of the plaintiff's said patented improvements, and that the court is therefore without jurisdiction of the claim. The 29 plaintiff's petition is dismissed, with judgment in favor of the United States against the plaintiff for the cost of printing the record, in the sum of seven hundred and sixty dollars and thirty-nine cents (\$760.39), to be collected by the clerk as provided by law.

Opinion.

Booth, Judge, delivered the opinion of the court.

The plaintiff, Lewis M. Haupt, a distinguished civil engineer, secured letters patent for certain improvements in dikes and breakwaters. The patent was granted April 3, 1888, and the letters patent numbered 380,569. This suit is for the recovery of compensation for the alleged use by the defendants of said patented devise in completing the improvement of Aransas Pass Harbor on the coast of the Gulf of Mexico, in Texas.

The facts disclose a jurisdictional issue, and while the findings are necessarily voluminous, the real development of the case, in so far as it happened, and the order of events is not open to much dispute. On March 22, 1890, the Aransas Pass Harbor Co. was duly incorporated under the laws of Texas. In May, 1890, Congress passed an act (26 Stat., 105) authorizing said company to construct within certain time limits a navigable channel in Aransas Pass Bay to result in the end in connecting the waters of the Gulf of Mexico and those of the Aransas Pass Bay and the Bay of Corpus Christi on the coast of Texas. The enterprise was a difficult one and the work to be done of vast public importance. The attempt under the first act of Congress resulted in a failure, *i.e.*, it was found impossible to meet the time limit set forth in the statute and this, together with other engineering difficulties, precluded the company from the benefits of the statute. On January 22, 1894, 28 Stat., 26, Congress passed a second statute wherein additional time was granted the company for the completion of the work and the rights of the company in the premises otherwise

recognized. The plaintiff herein proposed, after the passage of the act of January 22, 1891, to the harbor company the free use of his patented jetty. The license granted was upon the sole condition that the plaintiff himself was to supervise the work of construction and to receive, in conjunction with another engineer, the sum of \$1,000 when the work was successfully completed and the patented device demonstrated its worth. The company was to pay nothing for the use of the patent or the preparation of the plans and specifications. The company accepted the plaintiff's proposition with certain limitations. The plaintiff prepared the plans and drawings, submitted the same to the company, and it was found to involve too much expense to proceed in strict accord therewith. The company viewed the use of the patented jetty as more or less experimental and requested the plaintiff to modify his proposed plans of construction to meet its limit of financial outlay, which he did, resulting finally in the proposed construction of one-half of the patented jetty in order to determine its utility. In July, 1895, the Atascos Pass Harbor Co., contracted with Charles Clarke & Co., of Galveston, Tex., to construct the jetty in accord with the modified plans heretofore prepared by the plaintiff, and Clarke & Co. proceeded with the work until January 22, 1896. More than two years later, in May, 1898, the Congress

by proper legislation initiated the preliminary steps for 30 taking over the improvement of the harbor by direct appropriations. On May 28, 1898, the Senate concurred in a

resolution adopted by the House of Representatives authorizing the Secretary of War to prepare and submit plans and specifications for said improvement, together with estimates of cost necessary to complete the improvement of the harbor and secure the proposed inlet. A board was created by the Secretary in pursuance of said resolution and a detailed report followed covering extent, plan, and cost of the proposed work. The plaintiff in the meanwhile had called the attention of members of Congress to his patented jetty and urged its adoption, and while the report of the aforesaid board was pending before the House Committee on Rivers and Harbors, the plaintiff appeared in person before said committee and submitted an offer to complete the improvement of the harbor for \$700,000, a sum less than the estimate of the board. A sub-committee of the Rivers and Harbors Committee was appointed to consider the proposition submitted by the plaintiff and to this sub-committee the plaintiff again submitted his original bid, this time in writing, accompanied by a bond for the faithful performance of the work. The subcommittee declined to accept the plaintiff's proposition, expressing, however, a willingness to consider his proposed plan and their desire to give it a trial. To this end they recommended an appropriation for removing certain other improvements heretofore placed in the channel which interfered with the contemplated action of the plaintiff's patented jetty, and for the removal of which the plaintiff had submitted an estimated expense of \$50,000. On March 3, 1899, 30 Stat., 1128, Congress appropriated \$50,000 for dredging and improving

Aransas Pass Harbor. The Secretary of War, by the terms of this statute, was to expend said sum under certain specified conditions, one of which was for the removal of the so-called "Mansfield Jetty," and the other prohibited any expenditure until after the release and surrender of all rights and privileges theretofore acquired by the Aransas Pass Harbor Co. under previous acts of Congress. The harbor company executed the proper releases and conveyed to the United States all of its franchises and property rights whatsoever theretofore acquired by it. The plaintiff in writing notified the harbor company that his license to it for the free use of his patent was not transferable; he likewise notified Clarke & Co., as well as the committees of both the House and Senate in rivers and harbors. On June 13, 1902, Congress appropriated \$250,000 to continue the Aransas Pass improvements. This statute provided in terms for a continuation of the work under the plans adopted by the Aransas Pass Harbor Co. and for the removal of the "Mansfield Jetty." Previous to the passage of the foregoing enactment the plaintiff appeared before the House Committee on Rivers and Harbors and renewed his attempt to procure a contract for the completion of the harbor work. On this occasion his offer was reduced to \$500,000. The offer was declined by both the House and Senate committees. The Assistant Chief of Engineers of the Army was personally before the Senate committee and protested against awarding the contract for improvement to any private contractor, on the same occasion stating, "that if it was desirous of testing the Haupt patent he would be glad to give it a fair trial."

The plaintiff in proffering his bid for the work expressly stated in each instance that if awarded the contract no claim for royalty for the use of his patented jetty would be made, and if not so awarded, he "would expect something for the work of development and the use of the patent." On April 29, 1903, the United States made a contract with Henry C. Ripley for construction work on sand jetty. The plans, drawings and specifications followed by Ripley were first prepared by the Government engineer in charge of the work, after which they were submitted to the Aransas Pass Harbor Co. and by it to their consulting engineers, one of whom was the plaintiff himself. The plaintiff suggested amendments to the specifications which were adopted and brought the same within substantial compliance with his modified original plans and drawings. The plaintiff was personally interested in the Ripley contract; he furnished financial assistance to Ripley, and was to share in the profits of Ripley's contract.

Congress in 1905, 33 Stats., 1189, appropriated \$100,000 additional and authorized contracts to the extent of \$100,000 more for the continuation and completion of the project in accordance with the design and specifications of the Aransas Pass Harbor Co., and under contract with Clark & Co., pursuant thereto, the jetty was finally completed in March, 1906.

By the act of March 2, 1907, 34 Stats., 1091, Congress, upon the recommendation of a special board of engineers authorized by it, provided for changing the project into a twin-jetty project, which

was done by the War Department, as shown by Finding XVI, the change being made between March, 1908, and April, 1911, the Army engineers, under revised plans of the department, adding somewhat to the length of the south jetty in 1915.

Upon the first presentation of the case the court was under the impression that plaintiff's contention was predicated wholly upon the existence of an express contract, and relying upon that view of the case decided it accordingly. The case is now here on a motion for a new trial and to amend the findings, the plaintiff now insisting upon a decision respecting all features of the case; whether the same involves either express or an implied contract upon the part of the defendants to pay for the alleged use of the patented device. We believe that the plaintiff is clearly within his rights in so contending, and again enter upon a discussion of the case from every possible viewpoint going to the jurisdiction of the court to hear and determine the issues. In so far as any right to pay is alleged to flow from an express contract, we believe the issue clearly determinable adversely to plaintiff's contention. Whatever contract, if any at all, whether express or implied, must rest upon the plaintiff's representations to the committees of Congress and the subsequent expressions of that legislative body found in public statutes. Granting arguendo that a contract in any event could be implied under such a state of facts, then the court must gather from this particular Congressional record, and this record alone, the fact as to the meeting of the minds of the parties engaged in the transaction, supplemented of course by the pertinent transactions of the plaintiff with strangers to the present litigation, i. e., contractors engaged by the defendants to perform the work involving the alleged use of the patented jetty. In order to

bind the defendants the proof must directly connect them with
32 the use of the patented device, and in such a positive way as
to show a recognition of title in the plaintiff to the patent, and
its use by them under such circumstances as to indicate an intention
to pay for the same. *Berdan Fire Arms Co. v. United States*, 156
U. S., 552; *United States v. Societe Anonyme, etc.*, 221 *U. S.*, 320.

The question of infringement is excluded from consideration because the cause of action arose prior to the passage of the act of 1910, 36 Stat., 851. The defendants had no direct connection with the organization of the Aransas Pass Harbor Co. This company was the outgrowth of long years of effort to unite by a navigable channel the waters of Aransas Pass Bay and the Gulf of Mexico. It was in a way a private enterprise to accomplish a great public service and afforded the plaintiff a most excellent opportunity to test the efficiency of his patented device. The harbor company accepted the plaintiff's license to use his patent and as modified by plaintiff proceeded to construct the jetty. Clarke & Co., subcontractors of the harbor company, continued to use the plaintiff's patent and up to the time when Congress intervened by legislation to take over and complete the work of construction by appropriation of public funds a considerable portion of plaintiff's alleged patented jetty had been constructed. Plaintiff's personal appearance before the committees of Congress was as much in the character of a contractor as a patentee

APPENDIX.

U.S. Model.

U.S. Patent-Office.

L. M. HAUPT.
DIKE OR BREAKWATER

No. 380,569

Patented Apr. 3, 1888.

FIG. 1.



Off Model.

© Haupt—Sheet 2

L. M. HAUPt.

PIPE OR BREAKWATER.

No. 380,569.

Patented Apr. 3, 1888.

FIG. II.

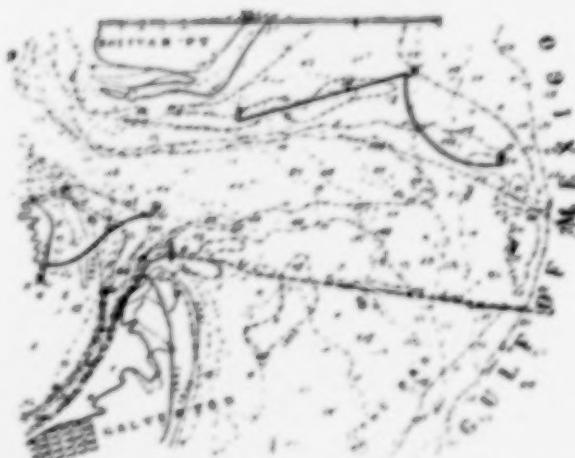


FIG. III.



guage, and usually, if not uniformly, leaves the question of acceptance open as in cases of individual negotiation. The language of the acts is not left open to doubt, and the statute itself left free from ambiguity in this respect. Some recitation, some positive recognition of the subject matter of the contract appears and is set forth in such a clear and unmistakable way as to leave no doubt that Congress intends by the enactment of the statute to enter into a contract with respect to the very subject matter for which compensation can be claimed. It is unusual to predicate a suit upon inferences from the express language of a statute and necessarily involves the deduction of conclusions from a positive enactment always doubtful and depending for support upon the consideration of innumerable events outside of and totally disconnected from the usual procedure of legislative bodies. In this very case we find repeated appropriation acts authorizing the expenditure of vast sums of money in aid of navigation, appropriations to complete a work of great public importance involving the highest skill of engineers, a work carefully considered by Congress for a long term of years and no specific mention of plaintiff's device, no language from which the court may infer an intent to make a contract with an inventor to use a patent right, which admittedly they knew about, except the mandatory provision to proceed in accord with the plans adopted by the original parties who initiated the construction of dikes and jetties to perform the designed purposes. Why would Congress withhold appropriations from the plaintiff, and leave it doubtful as to his right to receive any portions of the vast sums set aside for this very purpose, if they intended to recognize his patent and pay him for its use? Congress had the matter before them, the plaintiff was there in person, every detail of the enterprise was before the committees, and it seems almost incredible that private rights, rights of extreme financial importance to the plaintiff, would be left for determination by the courts when a simple appropriation would have cleared all doubt and covered all individual rights.

The defendants took up the work of construction where the company left it, and the appropriation acts import nothing more than an intention to avail themselves of the construction work theretofore performed by the failing company, an intent to prevent another effort *de novo*.

We have made the findings in detail. This course was the only one open to the court, notwithstanding the case must be dismissed for want of jurisdiction. The findings must show the completed transaction for a correct understanding of our conclusion.

The motions for a new trial and to amend the findings will be allowed in part and overruled in part, the former opinion will be withdrawn, and a new opinion filed dismissing the petition for want of jurisdiction. It is so ordered.

Hay, Judge; Downey, Judge; Barney, Judge, and Campbell, Chief Justice, concur.

(Here follow drawings marked pages 35 and 36.)

Lewis M. Haupt, of Philadelphia, Pennsylvania. Dike or breakwater Specification forming part of Letters Patent No. 380,569, dated April 3, 1888. Application filed December 13, 1887. Serial No. 257,810. (No model.)

To all whom it may concern:

Be it known that I, Lewis M. Haupt, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented a new and useful Improvement in Dikes and Breakwaters, which improvement is fully set forth in the following specification.

My invention consists in certain modifications in the form, position, and arrangement of dikes and breakwaters for improving the channels of rivers and harbors, whereby the efficiency of such structures is very greatly increased and their injurious effects largely avoided.

That the applications of my methods may be better understood it becomes necessary to state that the resources of the profession, as at present known and practised, are limited for harbors to "dredging alone or the use of tidal scour between jetties, aided, if necessary, by dredging," and for rivers "by artificially dredging the shoal spots, or by increasing the power of the current at these points by contracting the channel or by concentrating a larger volume of water where they occur, so that by its scouring action the obstructions may be washed away." Hence mechanical dredging and scour produced by current concentration between jetties constitute the sum and substance of present methods. This concentration is usually effected by one or more dikes, wing-dams, or trailing walls resting upon one or both banks of a stream or harbor entrance, and so adjusted as to reduce the sectional area to such an extent as to produce the required velocity. For cutting a channel across the exterior bar at harbor-entrances the jetties are generally built in pairs and are made convergent, but the effect of such works is to contract the entrance, seriously to obstruct the ingress of the flood, and to render the navigation more difficult and dangerous.

The general principles involved in the work of river and harbor improvement, and which my methods are designed to employ, are—

First. If the bottom velocity of a stream be increased to the limit required by the character of the material forming its bed, it will scour; if diminished, it will deposit.

Second. If the momentum of a stream be suddenly arrested or changed in direction by an obstruction placed in its path, a reaction will be produced, its head will be increased, and the bottom will be scoured out. This is particularly observable under the concave banks of bends, where the deepest water is generally found.

Third. If the volume of a stream be partially deflected by a trailing wall from one side of a crossover bar to the opposite side, the

current over the bar will be quickened and the crest will be lowered on the upstream side of the work.

38. Fourth. If the form of the cross-section of a stream be modified by cutting at one point and filling at another point of the same section, so that the area is not changed, (other things being equal,) the discharge will not be materially affected and the part so deepened will remain open.

Fifth. As a stream undergoes compression laterally in passing from a larger to a smaller section, the velocity of the portion near the banks will be increased relatively more rapidly than that at the center, and consequently the channel will frequently be bifurcated and the deeper water will be found nearer shore.

Sixth. In order that there may be a sufficient ebb-prism to produce a scour, the flood-tide should be freely admitted and the direction of the ebb-discharge be regulated and concentrated upon the weakest point of the bar, and not in the face of the flood.

Seventh. While the plane of tidal scour should be lowered, there should be no general disturbance of the entire body of the bar, which would otherwise reform when the velocity of the current becomes normal.

Eighth. The scouring force of a current is proportioned to the square of the velocity, while its transporting capacity varies as the sixth power.

Ninth. A jetty which causes an abrupt angular change in the direction of a current will produce injurious eddies and cause bars to be formed where they may become serious obstructions.

Tenth. The path of the ebb-stream in approaching and crossing the outer bar of harbors is along the line of least resistance, or at an angle of ninety degrees, or thereabout, to that of the flood resultant, where it is possible, and the deepest water is at the point where the flood action is the weakest.

The following observations will also be found of value in designing works for harbor and river improvements:

(a) The character, direction, and relative intensities of the forces acting upon any harbor-entrance may be determined with considerable accuracy from a study of the submerged topography and other local physical features.

(b) The form of the sandy spits adjacent to the entrance and the flood-tide channel lying under one of them and the ebb under the other will, in general, indicate the direction of the resultant movement.

(c) Harbor-bars are the results of the resistance offered by the shores to the momentum of the flood tide, and are composed almost entirely of beach sand and shingle.

(d) The flood and ebb forces are antagonistic, and the greatest effect of the one will be found where the energy of the other is least.

(e) The position of the entrance with reference to the general trend of the coast and cotidal lines will indicate generally the direction of the flood resultant and position of the ebb-channel.

In accordance with these principles and observations I have designed such forms of breakwaters and dikes and propose to place them in such positions as to produce the following results:

First. The operation of the natural forces in removing bars or preventing their formation is materially aided without serious interference with either the flood or ebb currents.

Second. By changing the directions of the confluent ebb currents before reaching the gorge by interior dikes, this resultant is increased for more efficient scour on the outer bar.

Third. By utilizing the natural tendencies of the flood a beach-channel is cut under the nearer lip of the inlet, and this channel is deepened by compressing the flood into it by reaction wings.

Fourth. The advancing flood-wave is broken up by an obstruction designed to cause it to precipitate its load of sand on the outer slope of the bar, yet not to prevent the ingress of the flood-prism, while at the same time it also prevents the dissipation of the ebb through and over the weir or swash channels, and so increases its effective action on the bar.

Fifth. Better results are secured with a development of about one-third to one-half of that ordinarily required, as it is possible to dispense entirely with one jetty and part of another.

Sixth. The designs proposed also reduce greatly the risks to navigation and become aids instead of dangers, as is the case with many jetties, especially when submerged.

In harbors the proper form for a breakwater to secure these desiderata is one composed of a series of intersecting arcs having their cusps or salients so placed as to cut the advancing waves and resolve them into components along the concave faces of the structure, which is intended to extend above high water. By this means the opposing components in the same cove will neutralize each other and the transporting-power of the wave be destroyed, and shoals will form outside of the barrier, which will tend to reinforce it and establish its position. The form preferred would be that composed of one or more curves or semi-ellipses, with a semi-conjugate axis of about one-fourth the transverse, and at the shore end having a straight or slightly-curved flank extending inward toward the gorge, to produce a reaction and compression upon that part of the flood intended to scour out and maintain the beach-channel. The position would be on or near the crest of the outer bar, where it would defend the ebb-channel lying behind it and conserve the ebb forces for action upon the weakest part of the bar, while at the same time it will oppose and disinti-

tegrate the flood without materially reducing the area of the section of ingress. The curves may be placed with their vertices opposite to each other, forming a double funnel-shaped passage, of the form of an hour-glass, through the gorge of which the tidal currents would be compressed with increased velocity.

In tidal rivers the form would be a reverse curve or ogee placed upon or near to the bar across which a channel is desired, and so adjusted as to produce a reaction of the impinging currents upon the bottom to create and maintain a channel. If the currents have not sufficient velocity to cut the channel, they may be aided mechanically by dredging out the cut in front of and filling behind the bulkhead with more durable material, so that merely the form of the cross section shall be changed, and not its area.

These improvements will be better understood by reference to the drawings.

Figure I represents a plan of the outer bar at the Charleston, South Carolina, entrance showing the form and position of the breakwater, and is selected because it is typical of a large class of similar phenomena. Fig. II represents a plan of the bar at Galveston, Texas, showing the position where the breakwater should be placed, and showing also a reaction-dike from Pelican Island. Fig. III represents a plan of reaction-dike at the upstream end of Petty's Island in the Delaware River, New Jersey.

Referring to Fig. I, the direction of the advancing flood resultant outside the bar and during the first and second quarters is shown at A. During the remaining half of the flood, and after the front of the wave has passed, it swings around to a direction nearly normal to the inlet. The flood-channel is seen in Maflit's channel under Sullivan's Island. The several swash-channels cross the bar at intervals, and the main ship-channel is at the point of the bar farthest removed from the entrance. The ebb thalweg lies nearly at right angles to the flood movement, and is in part defended by the submerged bar built by the flood. B B' B'' are the groins of the proposed breakwater, built in the form of semi-ellipses*, or any other curves which shall decompose and neutralize the flood energy. B'' F is the reaction-flank, intended to compress the flood in its passage through the shore or flood-channel. U S J and u s j are the submerged jetties in process of construction at this entrance, and which are so placed as to attempt to force the ebb to discharge in the face of the flood, and which require a much greater length of development. C D and E G, Fig. I, represent an arrangement of curves with their vertices opposite each other, whereby the tidal currents are compressed and increased in velocity over the crest of the bar.

In Fig. II, B B' indicate the arc or curved portion of the breakwater, and B'' F the reaction-flank. The breakwater is placed as in Fig. I, so as to decompose and neutralize the flood energy and compress the flood on its passage through the shore-channel. R D represent the reaction-dike, in the form of a reverse curve, springing from Pelican Island, and co-operating with the breakwater by conserving the energy of the inner forces for ebb effects. The broken line U S J represents the position of the submerged Government jetties at this

point, the effect of which has been to move the bar bodily seaward, which effect it was desired to avoid. The drawing indicates the topography at two dates—to wit, 1850 and 1867—for the shore-line, illustrating the movement and showing the direction and extent of the erosion in these seventeen years. The outer bar (1883) shows the effect of the submerged jetty at this latter date.

In Fig. III is illustrated a reaction-dike, R D, at the upstream end of Petty's Island in the Delaware River. The form of the dike is a reverse curve, as shown, designed to withdraw a part of the ebb-discharge from the south and throw it into the north channel, and so scour off the lower extremity of Five Mile Bar and make a channel for navigation, thus securing by one short dike what has generally required one or two of considerably greater length. Moreover, the action is local and direct and the dike is a guide and aid to navigation, whereas in methods hitherto adopted the action is general and the position of the deeper water is not well defined. The direction of the ebb is indicated by the arrow.

I am aware that curved dikes have been proposed for such improvements; but they are not of such form as will secure the results required for a successful treatment of the forces they are designed to control, nor are they properly placed, and I do not claim any originality in a simple curve as applied to the plan of a dike or breakwater; but

What I do claim, and desire to secure by Letters Patent, is—

1. A breakwater or dike rising to or about the water-level, composed of a combination of curves so arranged as to resist and decompose the flood resultant over a portion of the outer bar, and at the same time to permit the free ingress of the tidal prism to the inner basin, substantially as described.

2. A breakwater rising to or about the water-level and composed of a combination of curves and right lines so arranged as to resist and decompose the flood resultant over a portion of the outer bar, and at the same time to permit the free ingress of the tidal prism to the inner basin, substantially as described.

3. The breakwater herein described, rising to or about high water and consisting of a concave curved portion and a flank angularly approaching but disconnected from the shore, to produce a reaction and compression upon that part of the flood intended to scour out and maintain the beach-channel, substantially as set forth.

4. A breakwater rising to or about high-water level and comprising one or more curves having their cusps or salients placed so as to cut the advancing waves and resolve them into components along the concave faces of the structure, substantially as described.

5. A breakwater rising to or about high-water level and for improving the channels of rivers and harbors, said breakwater consisting of one or more semi-ellipses having at the shore end a straight or approximately-straight flank, substantially as described.

6. A dike for improving channels, said dike being composed of curves concave toward the current so disposed as to withdraw a part of the current from one channel and divert it into another, substantially as described.

7. A reaction-dike in tidal waters, composed of curves concave toward the current and disconnected from the main shore-lines, and so disposed as to divert part of the current force from one channel into another, substantially as described.

8. The combination of the breakwater composed of a series of intersecting arcs and a straight or slightly-curved flank, and the dike composed of compound or reverse curves for conserving the energy of the inner forces, substantially as described.

In testimony whereof I have signed this specification in the presence of two subscribing witnesses,

LEWIS M. HAUPT.

Witnesses:

ROBERT W. DAVIS,

CHARLES W. SPARHAWK

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VII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventeenth day of June, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that Lewis M. Haupt, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition be and it hereby is dismissed; And it is further ordered, adjudged and decreed that the United States shall have and recover of and from Lewis M. Haupt, as aforesaid, the sum of Seven Hundred and Sixty Dollars and thirty-nine cents (\$760.39), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VIII. *Proceedings After Entry of Judgment.*

On October 28, 1918 the claimant filed in open court, nine months as of August 15, 1918, a motion for amendment of substituted findings of fact. This motion was overruled by the court on December 16, 1918.

On February 14, 1919 the claimant presented for filing a motion for leave to file a second motion to amend findings. This motion was overruled by the court February 24, 1919, and the following order entered:

IX. Order of Court Entered February 24, 1919.

This case was orally and elaborately argued and was submitted together with briefs and requests for findings of fact on May 22, 1917.

On June 14, 1917, the court filed its findings of fact and entered an order dismissing the petition, with an opinion.

On August 13, 1917, claimant filed a motion for a new trial and for amendment of findings. Subsequently on October 15 the claimant was allowed to amend said motion for a new trial and amendment of findings after the defendants had filed a motion to strike the same.

On October 26, 1917, the claimant filed a motion for an extension of time to file a brief on his motion for new trial, and on November 19, 1917, the case was remanded by the court to the Law Calendar on motions of the parties for a new trial and to amend findings.

The case came on for hearing on April 2, 1918, when the motions were orally and elaborately argued, and the case was again submitted.

On June 17, 1918, the motions to amend were allowed in part and overruled in part; amended findings by the court were filed together with an opinion, and the petition was dismissed.

On October 28, 1918, claimant filed a motion for an amendment of the findings of fact, and this motion was on December 16, 1918, after full consideration, overruled.

Claimant's motion for leave to file second motion to amend findings is overruled.

BY THE COURT.

X. Claimant's Application for, and Allowance of, an Appeal.

Claimant hereby prays an appeal to the United States Supreme Court from a judgment of this court rendered on the 16th day of December, 1918, reaffirming a judgment rendered on the 17th day of June, 1918, by which the petition was dismissed.

BENJ. CARTER,
Attorney for Claimant.

Filed March 3, 1919.

Ordered:

That the above appeal be allowed as prayed for.

March 3, 1919.

BY THE COURT.

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Court of Claims.

No. 30379.

Lewis M. Haupt

vs.

The United States.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact (and of the Exhibits therein referred to and made part thereof); of the conclusion of law and the opinion of the court by Booth, J.; of the judgment of the court; of the claimant's application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twentieth day of March, A. D., 1919.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk, Court of Claims.

Endorsed on cover: File No. 27,032. Court of Claims, Term No. 336. Lewis M. Haupt, appellant, vs. The United States. Filed March 29th, 1919. File No. 27,032.

APR 19 1920

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

No. [REDACTED] 85

LEWIS M. HAUPT

v.

THE UNITED STATES.

MOTION OF CLAIMANT FOR REMAND TO
THE COURT OF CLAIMS FOR ADDI-
TIONAL FINDINGS OF FACT.

BENJAMIN CARTER,
Attorney for Claimant.

GEORGE RAMSEY,
Of Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 336.

LEWIS M. HAUPT
v.
THE UNITED STATES.

**MOTION OF CLAIMANT FOR REMAND TO
THE COURT OF CLAIMS FOR ADDI-
TIONAL FINDINGS OF FACT.**

Appellant, deeming that the findings of fact made by the Court of claims, contained in the record of this case, are not sufficient in their scope for true determination of the controlling facts, moves that the case be remanded to the Court of Claims with directions to make findings on the following points of fact:

I. Whether, when considering appellant's proposals for the continued use, in the improvement of Aransas Pass harbor, of his ideas and design, and deciding to avail of said ideas and design but to commit the work to the Corps of Engineers, as recited in paragraph IX of the findings of fact (Record, page 19) the Senate committee in any way expressed an intention or expectation

that no compensation would be paid to appellant by the Government, and whether the House committee and the Senate committee understood that, in the event of the use of his ideas and design in any other way than by contracting with him for the construction, he would expect such compensation.

2. Whether the two-jetty system, as employed by the army engineers in harbor improvements, assumed and provided for periodical dredging of the channel by artificial means.

3. On which side of the channel—that next the curved jetty or the opposite side—and at what longitudinal point or points of or in relation to the jetties, was the artificial dredging done in and after the year 1912, to which paragraph XVIII of the findings (Rec., p. 23) refers, and for what particular purposes was it done.

4. Whether before 1908 any dredging, except for removal of the artificial obstructions described in paragraphs III, VI, and X of the findings (Rec., pp. 12, 16, 20), was done to aid the development of the Aransas Pass channel, and at what time was blasting or dredging done toward removing from the channel such remains of the "Mansfield" jetty as had been left in 1906 at the conclusion of Moore & Sieber's work recited in paragraph X of the findings (Rec., p. 20).

5. Whether in the actual construction done in 1907 to 1915 upon the designs of the army engineers, as recited in paragraph XIV of the findings (Rec., p. 21), any change was made in the curved jetty already constructed.

6. Whether the purpose of the breakwater in the Wilmington, California, harbor, mentioned in paragraph XVII of the findings (Rec., p. 23), was to develop a channel or to close a gap between two islands.

7. Whether (a) the design for the Swinemunde, Germany, harbor improvement and (b) the study for the improvement of the Senegal River, Africa, mentioned in said paragraph XVII, included a single jetty or two jetties; and whether in each case the jetty-construction was planned to be on a reverse curve or a simple curve; also, in each case, whether the site of the proposed improvement was in a sea-shore harbor or a flowing river.

8. Whether the "Mansfield" jetty included one curve or two and, if only one curve, what sort of a line was the remaining part of the jetty, if any, to follow.

9. Whether the letters patent of E. O. C. Thomas mentioned in said paragraph XVII specified a reverse curve as a feature of the breakwater proposed and whether the purpose of the design so patented was (a) to scour a channel or (b) to neutralize the destructive force of waves.

10. What width of navigable channel, sixteen feet or more deep (though including spots where the depths was not more than six feet), was there at Aransas Pass in 1908, the time named in paragraph XVIII of findings (Rec., p. 23); also whether the channel thereafter continued to improve.

Appellant moves, further, that the Court of Claims be directed (a) to set out in the findings the text of the clause, referred to in paragraph X (Rec., p. 19) in the contract of Henry C. Ripley by which he agreed to indemnify the United States against any claim for the use of any patented invention and (b) to find whether that was a customary stipulation in contracts let by the Corps of Engineers for harbor or river improvements or other construction.

This motion will be understood better if considered in connection with the briefs and oral argument on the ap-

peal proper, and appellant therefore requests that hearing of the motion be postponed until the argument.

Copies of the main brief for appellant were furnished to the Solicitor General on March 23rd, 1920, and notice was given therein of this motion and of the purpose to ask that it receive attention from the court at the hearing.

BRIEF.

In the opening statement of the main brief filed for appellant the professional activities of appellant in his early years, before he had achieved national and international fame, and the development of his jetty-design (the first-cause of this suit) are sketched. The central facts are these: During long years of study and practical experience in hydrography and in hydraulic engineering appellant had kept firmly in mind the ideas that a current of water, by action upon and reaction from a concave bank of firm material, digs remorselessly, into a bottom of softer material so as to create a channel in a zone parallel to that bank; that the material so excavated, and disintegrated in that process, is thrown off transversely to the bank; and that in the ocean, where there is a limitless expanse of water, this detritus, if the bank lies at the proper angle to the coastwise currents and no other bank of any kind intervenes, will be floated away by those currents and disappear. Naturally he was impressed that great natural forces were lost and large waste of money incurred, in the development of a channel, when two banks (or jetties), on practically parallel lines were constructed and reliance was had on artificial dredging to clear away a bar that constantly formed at the outer extremity of these walls. On this

latter plan, with immaterial variants here and there, our army engineers had made and were continuing to make their improvements. No application had been made anywhere, so far as appellant knew, of the principles to which he was giving thought. Being employed some years in the Patent Office he made investigation and could not find any record of an invention or thesis on those lines; yet he was convinced that to create a channel of the necessary depth and width and to expell to a sufficient distance the dissolved silt was a question purely of determining (in relation to the volume and strength of the natural currents and the other physical incidents of the peculiar channel to be improved) the position, direction, size, materials, cross-sectional construction, etc., for a curved breakwater, with or without connecting walls, to give proper direction to the outward current.

When Mr. Haupt's ideas were patented and published they naturally challenged attention of engineers, scientists, and leaders of industry generally. The design was laid before the American Philosophical Society, one of the most renowned organizations of that character in this country, under a *nom de plume*, and after nine months' examination by engineers and hydrographers such a report was made that the society unanimously voted to award its Magellanic premium and medal for his "invention and discovery in physical hydrography and its application to the improvements of harbors;" this being the fifth occasion, in the society's life of more than a century when it had awarded such a premium (Proceedings of this society, 1887, vol. 21, p. 446). Year by year the design was discussed at the meetings of the Society of American Engineers upon theory and upon results accomplished by projects, on no great scale, which had been constructed under Mr. Haupt's direction. Circum-

stances combined to mark out Aransas Pass, Texas, for a demonstration of the design's efficiency in developing a channel in tide water. A plan of the army engineers for development of that harbor having failed, a private corporation, with rather scant financial resources, had taken up the work. The physical conditions were favorable for economical application of the plan. The channel at its inner end lay between St. Joseph's Island on the north and Mustang Island on the south, and the rivetted north shore of Mustang Island, slightly concave to the channel, sufficed to create a current which, properly controlled, would effect the desired scour further out. The problem then was to place a breakwater on the north side of, and also concave to the channel and scientifically to adjust its length, degrees of curvature, shape, etc., so as to bring about a sufficient erosion of the soft material at the bottom and throw it off, down the shore, beyond the desired ~~width~~^{width} of the channel. Mr. Haupt, already familiar with that harbor by reason of a study of the whole Texas coast which he had made during his Corps of Engineer service, now made a close study of all the local conditions and submitted to the engineers of the Aransas Pass Harbor Company a design for a jetty which in his judgment would do the work rapidly; but this was a rather more ambitious project than the company could shoulder and Mr. Haupt, therefore recast it, reducing the length of the jetty about a half. The company adopted this revised plan and proceeded with its execution. Mr. Haupt waived all claims to a royalty from the company but received a small honorarium for serving as a consulting engineer during the construction. This construction commenced in 1895; but unexpectedly the old Government jetty was discovered, crossing the channel, and the company's other difficulties were such

that by 1897 it was content to cede back to the Government the right which it had received and to look to Congress for completion of the improvement. Appropriate legislation of Congress followed and finally in 1899, as a condition to an appropriation of \$60,000.00 for removing the outer portion of the old Government jetty, the company executed a deed conveying to the Government its franchise and properties. Before this conveyance was made Mr. Haupt, in writing, advised both the company and the proper committees of Congress that the license which he had given for the use of his design was limited to the company and could not be transferred without arrangement with him. Mr. Haupt was invited and appeared before the proper committees of the 57th Congress and explained the design on which the jetty had been laid out and the evidences of its effects, so far as constructed, and he made propositions, first to the House Committee on Rivers and Harbors and then to the Senate Committee on Commerce, for the completion of the jetty by himself for lump-sum compensation, and he agreed, in that event, to waive all claims to royalty. The Acting Chief of Engineers was present at the hearing before the Senate committee, and, finding the committee disposed to utilize Mr. Haupt's ideas, suggested that nevertheless the execution of the work be entrusted to his Corps. The committee consented to this and provided an appropriation to be utilized by the Corps; but it prescribed that the construction be confined "to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore carried out on said jetty by said company, and to such additional work as may be necessary for strengthening the jetty." In those terms the

act was passed (approved June 13, 1902), appropriating \$250,000. By this and two successive appropriations, of \$100,000 each, by acts of March 3, 1905, and June 30, 1906, in identically the same terms, the jetty was completed; a contract being let under the first appropriation to Henry C. Ripley and two contracts being let to Clark & Co. The work of Clark & Co., was the completion of some 1,600 feet in the middle of the jetty, a large part of which had never been brought above low water. (32 Stats. Ch. 1079, p. 340; 33 Stats. Ch. 1482, p. 1130; 34 Stats. Ch. 3914, p. 737).

This jetty was completed in June, 1906; and from that time on there was a continuous development of the channel; but under plans of the army engineers adopted by Congress in 1907 and 1914 other works were constructed which were not included in and were harmonious with the Haupt design. These consisted of another jetty south of and parallel with the axis of the Haupt jetty, and a wall connecting the Haupt jetty with St. Joseph's Island.

By 1912 such a channel had been developed and such trade created by means thereof that the Texas Railway Commission rated Aransas Pass as a commercial port, putting it on a par with Galveston as to transportation rates. After the completion of the south jetty in 1912, as planned in 1907, recourse was had to dredging for maintenance of the channel. The plan of 1907 had assumed that such dredging would be necessary from the beginning at a cost of \$60,000 per annum, and the annual appropriations which followed carried for each year that identical item, but these moneys were not used until in 1912. During the years 1912, 1913, 1914 and 1915, dredging was done at a direct expense to the Government of over \$120,000 in addition to \$100,000, part cost of a new dredge.

(House Document No. 639, 61st Congress, 2nd session. Reports of Chief of Engineers: 1912, pp. 720, 2027; 1913, pp. 801, 2272; 1914, pp. 835, 2323, 2324; 1915, pp. 919, 2658.)

The above-recited facts appear in the findings of the Court of Claims or in publications of which this court is deemed to have judicial knowledge. It is apprehended, however, that they may not quite suffice for determination of the vital issues; and what this motion seeks is an opportunity to have the findings expanded to include any details which this court, upon hearing argument of the appeal, may regard as important. The motion assumes that the facts inquired of are already established by the deposition proof at the Court of Claims or public documents.

These details of fact naturally fall under several heads:

**Authoritative adoption of claimant's design and ideas
—Question 1.**

Whether the questions of the adoption by Congress of appellant's patented design and of its assumption that he would be paid what his invention, with his ideas for the application of the same at Aransas Pass, were worth, are jurisdictional, as considered by the Court of Claims, does not seem to be important, since upon these issues alone the petition was considered and dismissed. The findings would seem to be ample unless this court should say no presumption is to be indulged that Congress understood appellant as expecting compensation if the design were used in any other way than by direct contracting with him for completion of the jetty-construction. But the Court of Claims had before it the testimony of a Senator who at the time in question was a member,

and now is Chairman of the Senate Committee on Commerce and of two other Senators, when examined, one of [✓] had been chairman and another a member of the House Committee on Rivers and Harbors at that time; and if it be desirable to have the Court of Claims say, to one effect or another, what was the understanding on which the committees considered the question of using the Haupt plan without giving Mr. Haupt the contract, the fact should be easily determinable from that evidence.

**Saving by Haupt jetty of dredging—Questions 2, 3,
4 and 5.**

As is said in the main brief filed for appellant (pp. 24, 25), the saving of expense by the Haupt jetty, as against the plans of the army engineers and the appropriations of Congress of 1907 and the years following, is one, distinct measure for compensation to Mr. Haupt. Upon the main points that artificial dredging is an incident of twin jetties, that the money had been provided for such dredging at Aransas Pass while the Haupt jetty alone was functioning, and that no considerable dredging was done there until after a second jetty had been constructed, inquiry need not go beyond the findings of the Court of Claims and the reports of the Chief of Engineers; but, as appellant is advised, this whole matter will be clearer if this court were told the exact *loci* in the channel area, and the purposes, of some little dredging that was done during the construction, firstly of the Haupt, or north jetty, and subsequently of the south, or "Government" jetty. If it should appear that there were deposits, calling for artificial dredging, which were chargeable to the Haupt jetty, the fact might be deemed pertinent in connection with the expense of the dredging

done in and after 1912. If, per contra, the purpose of this sporadic dredging was to remove the remains of the old Government jetty, and that obstacle had reduced the efficiency of the Haupt jetty, these facts not only may be pertinent but may solve all doubts on the question whether the Haupt jetty, f. e. of any countervailing structures, would automatically have cleared and maintained a commercial channel and saved the Government all cost of artificial dredging.

Novelty of appellant's patent—Questions 6, 7, 8 and 9.

If appellant's claim against the Government should turn upon the validity of his patent, then one sub-issue is the patent's novelty; and it is submitted that the meager findings of the Court of Claims regarding supposed "disclosures of the prior art" (findings XVII, Rec., p. 23) are not sufficient to determine whether appellant's ideas were in reality anticipated. Inquiries are now suggested, therefore, respecting the intended functions of one structure and one paper patent cited and the structural elements of two other theoretical projects.

Width of navigable channel created by Haupt jetty alone—Question 10.

While the matter may not be important, this court may prefer to know a little more than is stated in finding XVIII (Rec., p. 23) with respect to the character of channel that was developed, after the completion of the Haupt channel and before any considerable work had been done on the south jetty. Pertinent questions then will be: (a) what navigable width was there in this channel, and, (b) whether the improvement was continuous.

Alternative measures of appellant's compensation.

The Court of Claims, for the reason that it could not say whether the Haupt jetty alone or the enlarged improvement, of which it is a part, caused the development of the commercial channel, refrained from finding any sum as reasonable compensation to claimant or dealing in any way with the measure thereof. According to appellant's view, there is sufficient evidence in the record and the engineering reports for computation of a judgment on more than one basis. This evidence includes, beside the necessary figures, the opinions of experts which have been received, according to the custom of the Court of Claims, regarding the proper measure of the recovery. Should the case be remanded, and should this court be impressed that something more is due to appellant than the mere saving for dredging during the years prior to 1913, convenience of the parties would be advanced by the court's designation of the proper heads on which findings shall be made in this connection.

If the Government, for the reason that the operations of the Haupt jetty are blended inextricably with the operations of the enlarged project, is legally bound to appellant for the entire results so accomplished, it would not be unreasonable to allow to appellant the difference between the cost (a) of the entire improvement and (b) of the Haupt jetty alone. This would seem but another way of saying as matter of law that the Haupt jetty was the sole agent in creating the channel and so relieved the Government from all real need of such expenditures as afterward were made.

Again there might reasonably be considered the cost of producing the channel in question, say, to the end of the year 1907, in comparison with the expense of similar

projects at other ports. For this comparison the harbor entrances at Galveston and Sabine Pass, Texas, Pensacola and St. Johns River, Florida, and Charleston, Cumberland Island and Winyah Bay, South Carolina, are suggested, with consent that any others may be added which Government counsel may regard as significant.

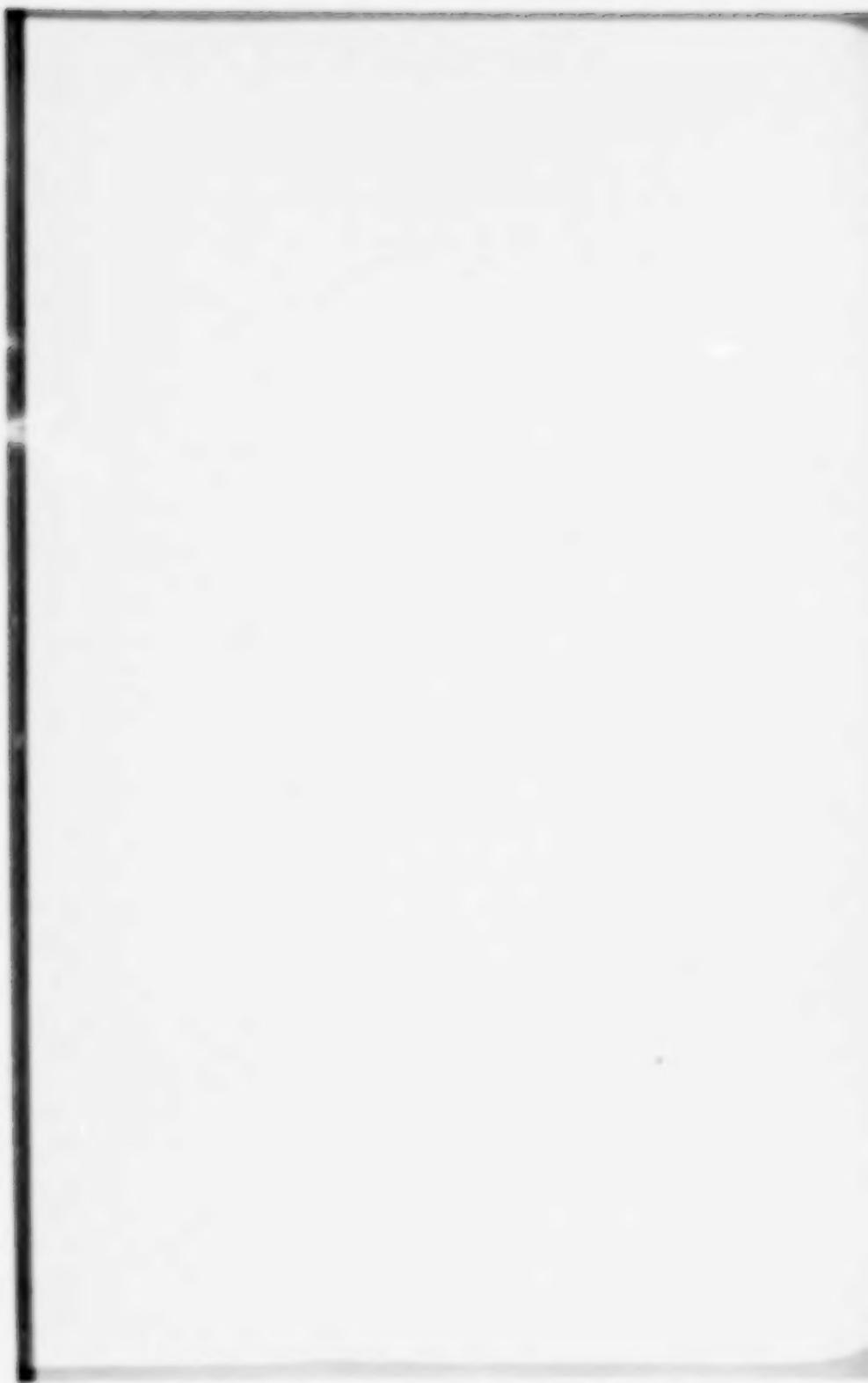
Another method of accounting proposed by the witnesses is the capitalizing of the expense saved. For example, \$60,000 a year saved by the omission of dredging alone is the equivalent, at five per cent per annum, to an investment of \$1,500,000, and \$220,000 which was actually expended for dredging in the years 1912 to 1914, inclusive (which means \$44,000 per annum) is the equivalent, at the same rate, of \$880,000 invested.

The subjects of this last sub-head are not included in this motion. The matters set up in the motion were presented to the Court of Claims by a motion, in the proper course, for amendment of its substituted findings.

BENJAMIN CARTER,

Attorney for Claimant.

GEORGE RAMSEY,
Of Counsel.



NOV 9 1920

FRANCIS J. CLOUTIER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 336. **85**

LEWIS M. HAUPT

vs.

THE UNITED STATES.

Motion of Appellant to Amend Motion For Remand to Court of Claims.

Appellant by his attorney shows to the court that there is now before the court a motion filed by him for a remand of the case to the Court of Claims in order that findings may be made on divers inquiries of fact stated therein; and he now by leave of court amends said motion by adding, for such findings, the following inquiries:

(11) Did the single-jetty design originally prepared by appellant for use by the Aransas Pass Harbor Company consist of a single curve or of a succession of two curves, reverse to each other, and, if two curves, what was the relative situation thereof to each other and to the shore and what was the length of each curve as so designed?

(12) As reformed for present use by said company what were the component parts of the design and what was the designed length of each part and its situation in relation to the other parts and to the shore?

(13) At what places on said reformed design was the work of Clark & Co., referred to in paragraph V of the

finding of fact, done and what work was accomplished by them at each place?

(14) In the specifications prepared in 1902 under advice of appellant for the work to be done by Henry C. Ripley what were the changes made from the specification on which the work of the Aransas Pass Harbor Company had been done and did such changes affect the lines or directions of the jetty proper, or of any part thereof?

BENJ. CARTER,
Attorney for Appellant.

APR 24 1920

JAMES D. MAHER,
CLEVELAND

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. [REDACTED] 85

LEWIS M. HAUPT

v.

THE UNITED STATES.

BRIEF FOR APPELLANT.

BENJ. CARTER,
Attorney for Appellant.

SUBJECT INDEX.

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When appellant, negotiating with committees of Congress, made one proposition for the use by the Government of his patented design upon which proposition no royalty should be paid him on account of the design, and stipulated that, if the Government should make use of his design and ideas in a different way from that so proposed, he would expect to be compensated, and Congress did direct and cause the use of such design and ideas in a different way from that proposed, a contract arose for appellant's compensation by the Government.....	12
When Congress (first rejecting a proposition by appellant to complete a jetty upon his patented design under a contract for a lump sum) accepted and adopted appellant's design and ideas, as submitted by him and as already defined in a partly completed structure, but committed to the Corps of Engineers the work to be done in such utilization, and did not deny or question that appellant was the lawful owner of said design and did not indicate a purpose that he should not be compensated for the use thereof, the Government was about to pay appellant the reasonable value of the design and ideas so applied	13
Whether appellant's design, accepted and utilized by the Government under direction of Congress, upon his explanation and offer of the same on terms of his compensation therefor, was aptly covered by his letters patent, is immaterial	15

One jetty being constructed under direction of Congress upon the patented design and ideas of appellant, with an implied promise of compensation to him for such use of the design and ideas, and other works being thereafter added, upon a different plan, and a channel being successfully developed by means of this aggregate structure, but the court, from the nature of the case, being unable to distinguish the results accomplished respectively by said first jetty and by said added works, appellant should have a judgment upon the basis of the entire results accomplished	22
If, as between one jetty constructed upon appellant's design, adopted therefor by Congress, and other works added thereto, one among various results accomplished by such aggregate structure is assignable solely to said jetty designed by appellant, compensation should be awarded to appellant for that single result if for nothing more	26

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 336.

LEWIS M. HAUPT
v.
THE UNITED STATES.

BRIEF FOR APPELLANT.

The subject of the controversy brought by this appeal from the Court of Claims is a design, patented by appellant, to scour automatically a channel for navigation, and the utilization of that design by the Government in improving the harbor of Aransas Pass, Texas. The design, in the particulars that it called for a single jetty and that no means other than the jetty itself were to be employed for dredging the channel, marked a radical departure from the traditions of Government engineering. This innovation, like the projects and methods devised by James B. Eads, C. P. Goodyear and other free-minded engineers, encountered opposition from the Corps of Engineers of the army; and the record of this case is in large part the history of competition between the "Haupt" design and the classical plan of twin jetties, with auxiliary dredging, to which the faith of the Corps was pinned.

The claimant in this case is a distinguished civil engineer, best known to the general public as a member of the first Isthmian Canal Commission. Graduated

from West Point, he served his novitiate as a practicing engineer in the Corps of Engineers of the army. For the better part of that period he was assigned to the hydrography of the Great Lakes and Texas coast and to other duties connected with river or harbor improvements of that region. Promotions in the engineer corps having been suspended by law, Lieutenant Haupt resigned his commission in September, 1869. For a time thereafter he served as an assistant examiner in the Patent Office. Thereafter he was engaged in the active practice of his profession and in technical authorship and for twenty years of the time was Professor of Civil Engineering in the University of Pennsylvania.

Mr. Haupt in his contact with problems of channel protection and improvement very soon received the impression that the established methods of maritime engineers involved unnecessary expense in jetty construction and in the subsequent maintenance of the channel; but neither in the War Department records nor at the Patent Office could he find that any form of structure had been devised by which this waste might be retrenched. He therefore, after many years of study and travel, worked out, and then patented, a design for a single jetty which would automatically—without the aid of dredging—create and maintain a channel. The jetty was to consist, according to the problems of the particular locality, of a compound or reversed curves, applied separately or in combination, and the scour was to be effected by the impinging of the seaward current upon the concave face of the jetty and by the reaction thereby caused of such nature as to disseminate the obstructing sand and distribute and deposit it traversely outside of the channel; the size of the jetty and its degree, or degrees, of curvature also to be determined by the local considerations.

Aransas Pass, Texas, known to Mr. Haupt through his

studies of the geography, the hydrography, the wind and tide conditions, etc., of that coast, suggested itself to him as an available situs for a demonstration of his design. This inlet was especially recommended by the fact that several attempts had already been made there, without success, to create a commercial channel and another attempt was in the making. The Government had in the years 1883-1889 spent more than half a million dollars on a jetty designed by engineers of the corps, but the result was so disappointing that upon the recommendation of a special board in the corps the project was abandoned and the appropriations of Congress centered upon Galveston as the one harbor of that coast to be improved. Consequently a corporation, styled the Aransas Pass Harbor Company, was organized and, by leave of Congress, constructed a wooden jetty, which also proved inefficient. This company having failed, a new corporation of the same name took up the work of improving the pass and harbor. The managers of the new company examined and were impressed with Mr. Haupt's patented design. He put it on paper for them in the form of a reverse curve, adjusted to the physical conditions and the funds of the company, drew specifications with the like aim and offered the plan for their use free of royalty or other compensation to him except a \$500 retainer fee. The offer was accepted and the construction proceeded, as planned, at a rapid rate until the old Government jetty was discovered to be obstructing the scour and the company had exhausted its resources. Congress then required the company to convey the work which had been done to the Government as a condition precedent to the continuation of the improvement. A preliminary small appropriation was made in 1899 for removal of the old Government-built ("Mansfield") jetty, but the money was never applied to this purpose (Rec., p. 17). In 1902 the Senate Committee on Com-

more, when considering a river and harbor bill, devined that the time had arrived to fix permanently a plan for developing the Aransas Pass channel. Mr. Haupt appeared before the committee with models and other explanatory exhibits, having had a hearing already before the proper House committee, and General McKenzie, soon to be Chief of Engineers, was present to speak for the corps, which had always been unfriendly to the Haupt design. The committee showed themselves favorably disposed toward Mr. Haupt's ideas and were discussing a proposal made by him that he should have a contract to complete the jetty for the lump sum of \$500,000 with a waiver by him of all claim for royalty and a guaranty, by bond, of success in creating and maintaining the channel. General McKenzie then suggested that even though the Haupt design be adopted the construction would better be done in the usual way, *i. e.*, by the engineers awarding contracts and supervising the performance of the same. The committee and Congress accepted this view. While the Haupt plan was adopted, an appropriation was made of only \$250,000, on which an initial contract might be let by the engineers. The text of the appropriating clause was:

"Improving Aransas Pass, Texas.—Continuing improvement \$250,000; Provided, That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company, and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current" (Rec., p. 19).

Upon invitation of the District Engineer in charge, having his office at Galveston, Mr. Haupt aided in the preparation of the specifications for the contract to be let by the Department under this appropriation. He also concerned himself that there should be a bid on the work at low enough prices to meet any scruples of the engineers. Conferring with Maj. Henry C. Ripley, another engineer of high rank, he arranged that Ripley would put in a bid; Haupt agreeing to lend Ripley the money needed to buy his plant and carry on the work until he should begin to receive his pay. That agreement was carried out. Ripley, being the lowest bidder, got the contract, and Haupt furnished him the funds for the earlier stages of the work.

When the proposition of a recession by the Aransas Pass Harbor Company to the Government was under consideration, Mr. Haupt wrote to the President of the company and to the chairmen of the committees of Congress letters admonishing them that the personal license held by the company for the use of the patented design would not pass to a grantee of its property; and this license was not included in the subject-matter of the release to the Government, which was finally effected by a deed of the company executed in 1899. Mr. Haupt, when he appeared before the Senate Committee, made clear his reservation of his right to be paid fair compensation by the Government, in the event of the continued development of the harbor and the use therein of his design, unless he were given a contract, of the tenor stated above, embracing the whole work (Rec., p. 19).

When work under the Ripley contract ceased (the jetty having been built from the two ends successively) there remained in the middle a gap of about 1600 feet. The construction was completed, under two successive appropriations and contracts for \$100,000 each, during

the years 1904, 1905 and 1906 by the contracting firm of Clarke & Company; the central gap being closed in June, 1906 (Rec., p. 20).

The engineers of the corps had not abated their hostility to the Haupt design. A board of engineers in a report to the Chief of Engineers of December 6, 1906, had suggested that sufficient time had not elapsed to test the Haupt design; but the District Engineer then in charge, Major Jadwin, had already recommended a return to the two-jetties plan and the connection of the Haupt jetty with St. Joseph's Island, the nearest land, and in a second report, of date December 22, 1906, the board concurred in this recommendation, submitting a detailed plan with an estimate of \$1,288,499.50 as the cost of the additional construction proposed. One feature of this new plan was the tearing out of 1,000 feet of the seaward end of the Haupt jetty and its reconstruction on a straight line, instead of a curve. The recommendation and estimate also included \$75,000 per annum for dredging the channel (H. R. Doc. No. 5, page 5, 59th Cong., 2d Sess., Rec., p. 2). The engineers had their way this time, and an appropriation was made toward carrying out their plan. Subsequently there was some slight modifications of this plan, made upon the recommendation of Major Jadwin, and additional appropriations. Upon these plans the opening between the Haupt jetty and St. Joseph's Island was closed in February, 1909, and construction proceeded, under successive contracts, on the construction of another jetty, some 1,300 to 1,700 feet south of the Haupt jetty, built out from the land bounding the pass on that side, viz., Mustang Island; but the Haupt jetty itself was never touched except to maintain its crest—no part of the proposed tearing out and realignment at the outer end was done. As for the dredging of the channel, no need therefore had been found by the engineers until 1912, or after the

new construction proposed by them had been in considerable part performed, and so for about six years following the closing of the central gap in the Haupt jetty no part of the appropriation was used for dredging (Rec., pp. 21, 23, 24).

As the construction of the Haupt jetty had proceeded the channel had deepened progressively. In the summer of 1906, just after the closing of the central gap, the depth available for navigation was over 16 feet, in a narrow channel. By 1908, there was a channel 100 feet wide. The improvement continued, so that by 1912 sea-going vessels of good size came in to carry away cargoes, chiefly of cotton and oil. The Texas Railway Commission in July, 1912, recognized Aransas Pass as a commercial port, and, by giving it railroad rates to compete with water rates, put it on a parity with Galveston (Rec., p. 23).

Claimant's case is that the jetty constructed upon his patented design is the agent which has developed this channel; that nothing but harm has come from the additional works constructed by the Government since 1907. A defense which Government counsel attempted to establish is that the Haupt jetty has not accomplished any substantial results; that its influence has been rather to block than to clear the channel.

The petition, however, upon a second hearing, was dismissed by the court on the ground (determined by it to be jurisdictional) that Congress did not adopt appellant's design and did not express any intention that he should be paid for the use of the design which was adopted.

Assignment of Errors.

Error, committed by the Court of Claims, is hereby assigned as follows:

- (1) In not holding that the legislation by which Congress adopted appellant's design, for use in the Aran-

sas Pass harbor, obligated the United States to pay appellant the value of the design for that use.

(2) In holding that Congress, in enjoining the War Department to apply appellant's design in the continued improvement of Aransas Pass harbor, as an alternative to the acceptance of the offer made by appellant to its committees to complete said improvement for compensation named by him with waiver of claim of royalty, did not bind the United States to pay appellant the value of his design when applied by the method of letting the work to an outside contractor.

(3) In not holding that, when Congress adopted for continued use in the Aransas Pass improvement a design of which appellant was patentee and did not express an intention that he should not be paid for the use of the design and did deny that the design was covered by the terms of the patent nor that the patent was valid, the United States was pledged to pay appellant for the use made, as contemplated, of the design.

(4) In not holding that, regardless of all question of a valid patent held by appellant, Congress, in adopting his ideas and plan for such continued harbor-improvement, obligated the United States to pay him the value of such ideas and plan so applied.

(5) In holding that in naming "the design and specifications of the Aransas Pass Harbor Company" for such continued harbor-improvement Congress did not adopt appellant's patented design.

(6) In not proceeding to ascertain the value to the United States of the results accomplished by the jetty completed under such authorization of Congress and to render judgment in appellant's favor for the amount so ascertained.

(7) In not proceeding to ascertain the value to the United States of all results accomplished after such authorization by Congress, by all the construction done, in

said harbor, including the jetty so authorized and other structures afterward erected, and if it were not possible to distinguish and separate the results effected by said jetty from those effected by such later structures, to render judgment in appellant's favor for the entire amount so ascertained.

(8) In not rendering judgment in appellant's favor for the amount of expense of dredging in the harbor saved solely by the jetty so authorized.

(9) In dismissing the petition.

Propositions of Law.

An act of Congress for taking or using private property or for employing the services of an individual, when enforced or complied with, becomes a contract for the payment by the United States of the identical compensation specified, or, if none is specified, for reasonable compensation.

United States v. Great Falls Mfg. Co., 112 U. S., 645 (656).

United States v. Cress, 243 U. S., 316 (329).

Davis v. Gray, 16 Wall, 203.

Glavey v. United States, 182 U. S., 595.

Whether the terms of a statute are explicit and clear or general and ambiguous the court, if possible, must ascertain and give effect to the intention of the legislators, if necessary supplying words or substituting words for others inadvertently used.

Stephens v. Cherokee Nation, 174 U. S., 445.

Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46 (56, 57).

Chesapeake & Potomac Telephone Co. v. Manning, 238 U. S., 186 (245, 248).

Chicago, St. Paul, etc., Ry. Co. v. United States, 217 U. S., 180 (187, 188).

- Lau Ow Bew *v.* United States, 144 U. S., 47.
 Brackett *v.* Chamberlain, 115 Me., 335.
 State *v.* Barnett, 173 N. C., 750.
 State *v.* Missouri Pacific Ry. Co., 262 Mo.,
 720 (730).
 Lewis's Sutherland on Statutory Construction,
 Sects. 363, 374, 381, 382.

If a statute is not clear on its face the courts in interpreting it will search committee reports or other legislative proceedings for expressions or indications of the intentions of the legislative body.

- St. Louis Iron Mountain & Southern Ry. Co. *v.*
 Craft, 237 U. S., 648.
 Tap Line Railroad Cases, 234 U. S., 1 (27).
 Buttfield *v.* Stansbury, 192 U. S., 470 (495, 496).

When the United States adopts and puts to use a patented appliance, design or process and does not deny that it is using the same or that the patentee is the true owner thereof, and does not disavow a purpose to pay him for such use, it is bound to pay him reasonable compensation.

- United States *v.* Societe des Anciens Etablissements Cail, 224 U. S., 309 (320).
 United States *v.* Berdan Fire Arms Co., 156
 U. S., 552, 567.
 United States *vs.* Harvey Steel Co., 196 U. S., 310
 (317, 318).
 Palmer *v.* United States, 128 U. S., 262.
 Pasqueau *v.* United States, 26 Ct. Cls., 509 (539).
 McKeever *v.* United States, 14 Ct. Cls., 396.

When, in circumstances that render the user of a patent liable to the patentee for compensation, the patented article is used, in conjunction with other

articles, in a single device or plant, and it is apparent that such combined use has been of value to the user, but it is inherently impossible, as between the patented article and the other so associated with it, to distinguish the results accomplished by each, the patentee's compensation must be on the basis of the entire results.

Westinghouse Electric Co. v. Wagner Co., 225 U. S., 604.

Callaghan v. Myers, 128 U. S., 617 (666).

Providence Rubber Co. v. Goodyear Extr., 9 Wall, 788 (802).

Walker on Patents, 5 Ed., Sec. 719, p. 816.

Argument.

The conclusion of law and opinion of the Court of Claims reduce the case to these simple issues: Did the committees of Congress, when they had heard appellant at length and seen by his models the particular application made at Aransas Pass of his design and then directed that the continuing construction in that improvement be on the "plan and specifications of the Aransas Pass Harbor Company" intend by that phrase to designate appellant's design, and, if so, should appellant in the absence of an appropriation to him in express terms be compensated for the use thereafter made of that design?

In other words, the Court of Claims decides that the legislation referred to, and its effectuation, did not amount to a contract. Appellant asserts that it did and that the United States is obligated to pay him the value of the ideas and plans in question for and in the development of the channel which by the year 1912, gave to Aransas Pass the status of a commercial port (Rec., p. 23).

Addison on Contracts (ch. 1, sec. 1, note 1), speaks of

"statutory contracts, as when an act of legislation contains a proposition which is accepted by individuals," and classes these as express contracts. If a legislative proposition and the acceptance thereof by an individual constitute an express contract, it would seem that this designation must be given to a tender made by an individual and accepted by the legislature.

But whether the contract between the United States and Lewis M. Haupt was express or implied is immaterial.

In the cases originating in this court where patentees have recovered judgment against the United States the decisions were grounded largely on the *Great Falls Mfg. Co.'s* case, 112 U. S., 645; 124 U. S., 581. There it was decided that when, under apt legislation of Congress, the Government, through a competent functionary, takes property of an individual, even without negotiation, there is an implied contract which gives the individual access to this court.

An application of this doctrine which has been quoted by the courts time and time again was made by the Court of Claims and this court in *Palmer's* case, 19 Ct. Cl., 669; 128 U. S., 262. This court in that case quoted the following, in the opinion of the Court of Claims, as conclusive of the "contract" question:

"The claimant in this case invited the Government to adopt his patented equipments and the Government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the Government did was done with the consent of the patentee and under his implied license." (128 U. S., p. 269.)

This case and others intervening were reviewed in *United States v. Societe Anonyme des Anciens Etablissements Cail*, 224 U. S., 309. No more had been

contended in that case for the Government than that there must be (1) a use of the patented design with the patentee's assent, and (2) an "agreement or meeting of the minds on the part of the patentee and on the part of the user, even though the amount of the compensation be not fixed." Of this argument the court said (p. 320):

"But these elements do not have to appear by the explicit declarations of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the * * * invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—can not be imputed to them without the most convincing proof. Such proof does not exist in the present case."

So the court found that there was a contract and affirmed the judgment of the Court of Claims.

In *United States v. Berdan Fire Arms Company*, 156 U. S., 552, the Supreme Court said (p. 567):

"In the case at bar, according to the nineteenth finding, 'Berdan, as an officer of plaintiffs herein, assignees of his inventions during the period covered by this action, was in constant communication with the ordnance officers, requesting the use of his devices by the Government; they knew him as an inventor, and knew his inventions as soon as they were patented; and, by the twenty-third, 'plaintiffs have desired the Government should use their patented devices, and have also desired and requested compensation for such use.' So far, then, as the petitioner is concerned, the use of this invention was with its consent, in accordance with its wish, and with the thought of compensation therefor.

"While the findings are not so specific and emphatic as to the assent of the Government

to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the Government that the patent was wrongfully issued; no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use, in spite of protest or remonstrance. Negatively, at least, the findings are clear. The Government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner."

The principles applied in that decision had been declared by the Court of Claims long before in McKeever's case, 14 Ct. Cls., 396.

As would appear from the quotations above, it is of no consequence that there was no apt description, in the agreement, of the design to be utilized, if the two parties had the one thing in mind, and it is immaterial that no price was put on the use of the design or that no method was provided for determining the amount to be paid. Here there is in point also the following from *United States v. Harvey Steel Co.*, 196 U. S., 310 (pp. 317, 318):

"It is argued that the agreement was only to pay for the use of the process covered by the patent named, and that if the meaning of the parties was to cover anything broader than the patent, even what was known in their speech as the Harvey process, that meaning could be imported into the contract only by reformation, not by construction of the contract as it stands. But we are of opinion that this defense also must fail. The argument is that at the time of the contract it was supposed that the heat required for the process was greater than that actually used, that the patent was valid only for a process with the greater heat, and that the contract covers

no more than the patent. But the fact that the parties assumed that the process used and intended to be used was covered by the patent works both ways. It shows that they thought and meant that the agreement covered and should cover the process actually used. We think that this can be gathered from the agreement itself apart from the mere supposition of the parties. The contract dealt with a process known as the Harvey process." It imported the speech of the parties and of the common speech of the time into the description of the subject-matter. * * *. It also identified it, it is true, as a patented process, but, if the incompatibility of the two marks is more than trivial, as it was regarded by the court which found the facts with which we have to deal, the identification by personal familiarity and by common speech is more pungent and immediate than that by reference to a document couched in technical terms, which the very argument for the United States declares not to have been understood. It is like a reference to monuments in a deed. As we have said, this identification by personal experiment and by common speech is carried forward into the contract in suit. The latter contract manifests on its face that it is dealing with a process actually in use, which requires the communication of practical knowledge and which further experience may improve."

Unquestionably, in the instant case Congress intended to adopt the "process" (design and specifications) which the Aransas Pass Harbor Company had been using, and this process, in all its elements and incidents, was identified to the legislative mind as having been originated by Lewis M. Haupt.

Evidently, too, it is immaterial whether the Government has made much or little use of the patented design, or whether it has used the entire design, or

whether it has used the design in conjunction with something else not covered by the patent.

Again: if at the time when an invention was appropriated by the Government there was no other market for it, or even though, in the use made by the Government, the invention had proved ineffectuous, such fact would not impeach the contract—though, of course, the results accomplished by the patented article go to the measure of the inventor's compensation.

James v. Campbell, 104 U. S., 356, cited in
United States v. Palmer, *sup.* (271, 272).

Palmer's case in 19 Ct. Cls., (p. 671).

Dahlgreen v. United States, 16 Ct. Cls., 30 (53).

"What was the claimant's device worth in its market at the time it was taken?" As in many of the other patent cases which have been before the court, the invention at the time of the taking had no market value; it was only likely to be used by the Government on navigable streams, and that rarely. Moreover, it had not then been actually tested in its own limited field. The question is not what experience has shown the invention to be worth, but what it was worth when the Government appropriated it."

Pasqueau v. United States, 26 Ct. Cls., 509 (539).

The Pasqueau case, it will be observed, related to a water-way improvement, as does the present case. In another detail to which Pasqueau's counsel adverted (p. 532) the cases are alike. The result which Pasqueau sought was "accomplished," it was said, "by a device so simple that it causes one to wonder on seeing it for the first time (as was said of the telephone) that it had not been invented long before. This is often the case, as the Supreme Court has observed, with inventions of

the greatest merit.' *Loom Co. vs. Higgins*, 165 U. S., 591."

"The claimant here knew that his device was of little value save for military use and that the Government would be substantially the only customer. * * *

"By the term 'use of the invention' is not to be understood its usefulness. The utility of the invention can not be attacked in this action; the user under patent right is the only issue in the case. Whether a newly discovered use is or is not more useful than the old one which it supplants the customer must determine for himself before he buys the patented article or uses it under the inventor's license."

Palmer's case in 19 Ct. Cl. (pp. 670, 671).

"We need not, however, dwell longer on the excellence of the invention. The Government has testified to its excellence by using it in the guns intended for the national defense."

Anciens Etablissemens case, *sup.* (p. 323).

"The fuller the statement should be made the more fully it would appear that the United States was dealing with a matter upon which it had all the knowledge that anyone had, that it was contracting for the use of a process, which, however much it now may be impugned, *the Government would not have used when it did but for the communications of the claimant, and that it was contracting for the process which it actually used.*" (Italics ours.)

Harvey Steel Co.'s case, *sup.* (pp. 318-319).

See also *Berdan case*, *sup.* (p. 566).

It is also decided in the Harvey Steel Co. case that it was not material whether the process bargained for and used was covered by the patent invoked; that if the Government sees fit to avail of the ideas of an inven-

the grants he is lawfully entitled to be paid for the use made.

The sum of the decided cases is this, that if an inventor offers his invention to the Government and it is accepted and used, with no declaration by the Government's representative of a purpose not to pay for the use, and without a waiver of any sort by the inventor of his right to compensation, a contract, enforceable by suit, is created notwithstanding that the invention was not covered by a patent, and notwithstanding that some parts of the invention were not availed of, and notwithstanding that the invention when applied possessed no real utility.

Can it be disputed that all of these elements of a contract occur in the present case— which presents this peculiar feature alone, that the Government itself, i. e., Congress, not as executive agent of the Government, engaged with the inventor for the use of his idea?

There is ample reason why Congress, in adopting the design in question, should have used the words "design and specifications of the Arkansas Pass Harbor Company." It was clearly understood that Haupt's design, as regards the degrees of curvature, the dimensions and the shaping of the jetty, etc., had been adjusted by him to the needs of that particular locality and of the channel to be created, and this was a problem to be solved wherever the design should be used. If the law had been written "patented design of Lewis M. Haupt," the army engineers would have been at liberty to remove the existing structure and substitute another, within the description of the Haupt patent but upon lines untried at that hour.

The committees of both houses perfectly understood what they were doing. Mr. Haupt's first proposition was made in answer to an invitation from the House committee (Rec., p. 19). The Senate committee, by

which his tender of the design was finally accepted, examined his models, learned from him and the Government engineers present, and from Departmental reports, the history of the channel-development, including the evidences that this design did the work, and, when agreeing to the desire of the engineers to be entrusted with the work, and choosing phrases for the appropriation, it intended that this patented design, and none other, should be used in the completion of the improvement, and the committee could have had no other impression than that Mr. Haupt expected to receive money compensation.

If the Secretary of War had done on his own motion what Congress did—had settled upon and used the Haupt design as the best for that improvement, after the Government had taken back what Congress had formerly granted to the Aransas Pass Harbor Company, and had received notice from Mr. Haupt that his patent rights were reserved except as against the harbor company, and had *not* intimated that nothing was to be paid to Haupt for this continued and complete use of his invention—it would not be denied, we assume, that the Government was legally bound to compensate Mr. Haupt. But has the head of an executive department a power which Congress has not to pledge the money of the Government?

In the opinion of the Court of Claims it is said (Rec., p. 27) that in order to bind the United States to appellant the use made of his design must have been "under such circumstances as to indicate an intention to pay for the same." In view of the decision cited above, and others, it would seem more correct to say that the Government was bound unless the circumstances were such as to rebut the presumption that compensation was intended. Patent cases in the Court of Claims are like others in the particular that the Government is held to have promised

by implication to pay for any benefit it has received in silence from an individual. If the Government's representative denies that the person proffering a new appliance or process is the originator thereof, or on any other ground disavows intention to pay him for the use thereof, then (if he held a valid and pertinent patent), upon use made, a pure case of infringement arises—which, before the act of February 1, 1910, was not justiciable.

In relation to the attitude of appellant in his dealings with the committees of Congress, the opinion of the Court of Claims, at record pages 27 and 28, contains some inapt (doubtless inadvertent) expressions. Only in proposing to complete the jetty, as already defined, for lump compensation named by himself, under bond for successful results, did appellant assume, or seek, the "character of a contractor." Appellant's "respective propositions" were (1) that he would complete the jetty, and warrant its success, and the Government would pay him the sum named, or (2) that, if Congress should adopt his design but leave the Corps of Engineers to do the work, or to have it done, in the usual way, he should be paid the value of the design—the Aransas Pass Harbor Company having no power to convey the license he had given it for a free use.

A sufficient reason why "private rights" were "left for determination"—why no appropriation was made to appellant's benefit (Rec., p. 29)—was that the amount of his compensation was naturally deemed to depend largely upon the degree of the jetty's utility as finally demonstrated.

From the bare terms of the legislation the Court of Claims could not have determined what kind of a jetty was to be constructed; the phrase "design and specifications of the Aransas Pass Harbor Company," meant nothing to one who had no knowledge of the work which that company had done and the plan thereof. But

in the act of determining what negotiations occurred between appellant and Congress the court has learned what this phrase signifies. The information needed, that is to say, is gathered, as it may be for the purpose of interpreting any ambiguous statute (*St. Louis, Iron Mountain & Southern Railway Co. v. Craft*, 237 U. S., 548; *Tap Line Railroad Cases*, 234 U. S., 1, 27; *Butfield v. Stranahan*, 192 U. S., 470, 495, 496) from the legislative proceedings by which the law was framed; and unquestionably it is established by those proceedings that the committees of Congress, in considering what had been accomplished at Aransas Pass and the promises of the jetty, truncated by the collapse of the harbor company, thought of the design and ideas of appellant, so utilized, and of none others. The phrase used by Congress then, was in legal effect the same as "design of Lewis M. Haupt and specifications prepared by him, which have been applied by the Aransas Pass Harbor Company."

Provided only it is clear what the words were intended to mean, it is of no importance what name a legislative body has happened to give to anything with which it dealt. The *purpose of the legislature*—this the court must seek to accomplish in applying any statute.

Stephens v. Cherokee Nation, 174 U. S., 445.

Wisconsin Central R. R. Co. v. Forsythe, 159 U. S., 46 (56, 57).

Chesapeake & Potomac Telephone Co. v. Manning, 238 U. S., 186 (245, 248).

Chicago, St. Paul, etc., Ry. Co. v. United States, 217 U. S., 180 (187, 188).

Lewis's Sutherland on Statutory Construction, Secs. 363, 374, 381, 382.

It is respectfully submitted that, if it is established that the committee of Congress which shaped the legislation of 1902 had in mind, and intended that the Government should avail of appellant's ideas and designs, a legal presumption follows that the committee expected appellant to claim and receive compensation from the Government. If this view is not correct—if the court holds it to be incumbent on appellant to establish the fact of this understanding and expectation of the committee—the court will be requested to remand the case with directions to the Court of Claims to make an explicit finding, from evidence already in the record, on this point. A motion, relating to this and other omissions in the findings, will be filed with the request that it be heard in connection with the appeal itself.

If the effects of the Haupt jetty can not be distinguished from those accomplished by the other works afterward constructed the Government is liable to appellant for these entire benefits.

The jetty completed under the Ripley contract and the Clark contracts mentioned in the findings (Rec., pp. 19, 20) was constructed absolutely upon appellant's design as originally reduced to details by him for use by the Aransas Pass Harbor Company; this jetty being on the north side of the channel. The works added later, consisting of a straight jetty to the south of the channel and a wall connecting the Haupt jetty with St. Joseph's Island, were upon the plans of the army engineers adopted by Congress in and after 1907. In so far as the scour between the jetties was effected by the north jetty, Mr. Haupt's design must be regarded as the dynamic agent in the development of the channel.

Assuming that the question of the adoption by Congress of appellant's patented design is jurisdictional, and

that the adverse judgment of the Court of Claims on this point is correct, any findings relative to the proved efficiency, and value, of that design would seem to be gratuitous; yet the court finds that, while a navigable channel was produced after the construction of the second jetty, roughly paralleling the other, it can not determine (Rec., p. 24) to its satisfaction whether the Haupt alone accomplished this result or whether, if left alone, it would have produced such a channel.

If any question of fact is capable of solution the Court of Claims can and does solve it. A mere "hung jury," the result of varying impressions made by evidence on different minds, is not possible in that forum. Its verdicts are made by a majority of five judges; and cases can be passed, or reheard, to obtain a full bench and break, or prevent a tie. The present finding, therefore, is to be taken as meaning that the confusion of fact is inherently of such sort that it could not be cleared by any proof whatsoever.

The law applicable to this state of things is clear.

In *Westinghouse Electric Co. v. Wagner Co.*, 225 U. S., 604, this court said:

When a case of confusion does appear—when it is impossible to make a mathematical or approximate apportionment—then, from the very necessity of the case, one party or the other must secure the entire fund, it must be kept by the infringer or it must be awarded by law to the patentee. On established principles of equity, and on the plainest principles of justice, the guilty trustee can not take advantage of his own wrong. The fact that he may lose something of his own is a misfortune which he has brought upon himself. * * * He can not appeal to a court of conscience to cast the loss upon an innocent patentee. * * *

This decision invokes the rule declared by Chancellor Kent in *Hart v. Ten Eyck*, 2 Johnson, Ch. 62, and since

applied in various patent or copyright cases, that "all the inconveniences of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it." Among those cases are:

Callaghan v. Myers, 128 U. S., 617 (666).

Providence Rubber Co. v. Goodyear, Extr., 9 Wall., 788 (802, 803).

The Court of Claims does not say that the value to the United States of the creation of a channel by the aggregate project in which the Haupt jetty was incorporated—by which that jetty was overlaid and its workings obscured—can not be determined; and it is submitted that a distinct finding should be made by that court on this point (if the present findings do not afford a basis for a conclusion of law and judgment) and the entire amount so found should be awarded to appellant.

In one particular, comparatively small as regards the moneys involved, the separate achievements of the Haupt jetty can readily be determined. While this jetty alone was operating, that is until the added construction of 1907 and later years began to show its effect, the continuous scour of the channel was accomplished without artificial dredging—precisely that thing occurred which the curved jetty was designed to accomplish. The twin-jetty plan, like all others of that class, presupposed artificial dredging, and the plans of 1907 and 1910 included appropriations for that particular purpose. But it was not necessary to use these appropriations—the expected dredging was not needed—until in 1912, when the south jetty was approaching completion. The saving of the dredging which the engineers had expected to do, and the expense thereof, is to be assigned to the Haupt jetty alone. This fortunate condition continued so long as there was no substantial interference with the operation of

that structure; it terminated when the superadded works became a serious factor.

Although the Court of Claims has found (Rec., p. 23) that "dredging was necessarily done in the years 1912 and 1915, inclusive, to maintain a navigable depth of channel in the pass," the record is not as full and clear, regarding the previous omission of the dredging, and the cause thereof, as could be desired. This is one of the subjects to be presented in the motion for a remand.

BENJ. CARTER,
Attorney for Claimant.

GEORGE RAMSEY,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

LEWIS M. HAUPT, APPELLANT,
v.
THE UNITED STATES. } No. 336.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is before this court on appeal from the judgment of the Court of Claims dismissing appellant's (who will hereinafter be called claimant) claim for compensation alleged to be due under an alleged contract between claimant and the United States for the use of a patented invention involving a jetty or breakwater. The events which led up to the filing of the claim were, briefly, as follows:

Congress franchised a Texas corporation, known as the Aransas Pass Harbor Company, to develop Aransas Pass Harbor into a commercial port, Aransas Pass at that time being a nonnavigable inlet connecting the Gulf of Mexico with Aransas Bay and the Bay of Corpus Christi. Lewis M. Haupt, the claimant,

having obtained a patent purporting to cover a jetty or breakwater gave to the Aransas Pass Harbor Company a free license to use his patented construction in the development of the channel through Aransas Pass. This company built part of a jetty at Aransas Pass but failed to fulfill the requirements of the statutes enfranchising it and in compliance with the terms of these statutes conveyed to the United States all of its rights in the harbor at Aransas Pass, together with the jetty which it had partly constructed. Thereafter Congress by a series of acts appropriated money for the completion of the work begun by the Aransas Pass Harbor Company. Work was carried on under these acts until the project was completed, after which claimant filed the present suit against the Government to recover compensation for the use of his patented invention, alleging that his invention was used by the United States in the completion of the improvements at Aransas Pass, and also the existence of a contract between claimant and the United States for the payment of compensation for such use.

The acts complained of all occurred before June 25, 1910, so that the statute of that date (36 Stats., chap. 423, p. 851) giving patentees the right to sue the United States for the infringement of their patents is not involved, the action being brought entirely under the Tucker Act (24 Stat. L., chap. 359, p. 505).

The case was twice presented to the Court of Claims; first, at final hearing, after testimony had been taken by both parties to the suit, and again,

after the court had rendered its decision, on claimant's motion for a new trial.

Upon the first presentation of the case, the court understood claimant to contend that an express contract existed between the claimant and the United States, and finding that no such contract did in fact exist decided the case against claimant.

Claimant in his motion for a new trial contended that he was entitled to a decision as to whether or not there was a contract either *express or implied*. The court therefore considered both contentions and decided, as before, that there was no express contract, and also that under the circumstances no contract could be implied and dismissed the case for want of jurisdiction.

CONTENTION OF PARTIES.

Claimant alleges the existence of a contract, express or implied, by which the United States agreed to pay reasonable compensation for the use of claimant's patented invention.

Defendant contends that there was no such contract and that, therefore, the Court of Claims properly dismissed the suit for want of jurisdiction.

Defendant bases its contention upon the facts that in claimant's representations to the committees of Congress which were considering the improvement of Aransas Pass, and the subsequent expressions of Congress in the statutes authorizing the improvements at Aransas Pass, the *express* contract must be found, if at all, and that it is impossible to

find a contract in either of these and the further fact that it is impossible to find the prerequisites of an implied contract, namely:

- (1) That the United States recognized the title to the patent in the claimant; and
- (2) That the invention was used under such circumstances as to indicate that the United States intended to pay for such use.

(*United States v. Société Anonyme*, 224 U. S., 320; *Berdan Firearms Company v. United States*, 156 U. S., 552.)

SUMMARY OF FINDINGS.

The findings of fact are quite voluminous and, therefore, it is thought advisable to give a brief résumé of the same

The Court of Claims found that as early as 1869 attempts were made to create a navigable channel in the Aransas Pass inlet. In 1885 the Federal Government attempted to create a channel which involved the building of a jetty which became known as the "Mansfield Jetty." This attempt was unsuccessful, and in 1888 a considerable portion of that jetty had disappeared. Prior to 1889 work was continued by the Government on a "two-jetty" plan to the extent that the remaining portion of the Mansfield Jetty was extended, but this work was discontinued upon the recommendation of a special board which considered the subject of Texas inlets and recommended the suspension of all projects for improvement of harbors on the Texas coast, except that of Galveston.

On March 22, 1890, the State of Texas chartered the Aransas Pass Harbor Company as a private corporation "to engage in a work of great public importance," namely, the improvement of Aransas Pass. By the act passed May 12, 1890 (26 Stats., Chap. 201, p. 105)*, Congress granted to the Aransas Pass Harbor Co.,

(26 Stats., Chapter 201, p. 105.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Aransas Pass Harbor Company, a corporation duly chartered under the laws of the State of Texas, and their associates, assigns, successors, and representatives be, and they are hereby, authorized on the conditions hereinafter mentioned, to construct, own, and operate such permanent and sufficient jetties and breakwaters and such auxiliary works as are necessary to create and permanently maintain, as hereinafter set forth, a navigable channel across the outer bar, which obstructs the entrance to Aransas Pass Harbor, on the coast of the Gulf of Mexico, in the State of Texas, and so far into the bays and navigable waters as may be necessary to reach a place that will afford ample dockage and protection from storms, swells, cyclones, and tidal waves for the purpose of furnishing the vessels and boats adapted to the purpose, facilities for navigation in and along the entire length of said channel and for that purpose they may construct in the Gulf of Mexico and in and across the bays and navigable waters adjacent thereto such walls, jetties, dikes, levees, and other structures, and employ such boats, rafts, bridges, and appliances, as they may in the prosecution of said work deem necessary: Provided, That no such structure or means employed shall hinder, delay, or interfere with the free navigation in said channel, harbor, bays, or navigable waters; and to protect their said works they may build and maintain such levees, embankments, walls, or riprap as may be necessary to secure their permanency along the banks or shores of Mustang, Saint Joseph, and Harbor Islands as the United States is authorized to grant, and to utilize such works as the Government has already constructed, and will hold the United States harmless from any damage that may accrue to any person or persons by the construction of said walls, jetties, dikes, levees, and other works constructed thereunder: Provided further, That unless the construction of the proposed work shall be commenced within one year from date of the approval of this act and be diligently prosecuted by the expenditure of at least three hundred thousand dollars per annum thereafter in the prosecution thereof until twenty feet depth of water over the outer bar is obtained, the grant of privileges herein shall be forfeited; and unless the said company, their associates, assigns, successors, or legal representatives shall secure a navigable depth over said outer bar of fifteen feet of water within three years after the date of the approval of this act, and a navigable depth of twenty feet of water over said bar within five years from said date, then

its assigns, successors, etc., a franchise to open Aransas Pass, providing that the work thereon should be commenced within one year of the passage of the act and that at least \$300,000 per annum should be expended upon said improvement until a channel 20 feet deep should have been obtained. Congress further provided, in this statute, that should the company fail to meet these conditions all privileges granted by the act should be forfeited (thereby reverting to the United States) and that at any time after the completion of the improvements the United States should have the right to pay the company the value of the improvements, and on such payment to obtain all rights in the work done by the company.

This company, in March of 1892, began work upon a jetty known as the "Nelson Jetty," but abandoned this work in August of 1893, and this jetty was later destroyed by the waves. The Aransas Pass Harbor Company failed to meet the conditions imposed in the hereinbefore referred to act of May 12,

Congress may revoke the privileges herein granted in relation to said improvements.

Sec. 2. That at any time after said improvements and auxiliary works have been completed as herein provided, and said depth of twenty feet has been obtained, the United States shall have the right to pay the said company, or their assigns, successors, or legal representatives, the value of the works constructed under this act or under or by virtue of any authority granted by the State of Texas, and on such payment being made by the United States all rights to said work on the part of said parties shall cease, but nothing in this act shall be construed as compelling the Government to take possession of and pay for said works unless so desired. Nothing within the provisions of this act shall be construed as authorizing the said company to charge or collect tolls or tonnage upon boats or vessels navigating said channel and the navigation of the same shall be free.

Approved, May 12, 1890.

1890 (26 Stat., p. 105), and Congress by act of January 22, 1894 (28 Stat., chap. 12, p. 26),* released the company from certain of the conditions of the prior act and granted to it the right to resume the work.

After the passage of this act of January 12, 1894 (second act), Haupt, the claimant, granted to the Aransas Pass Harbor Company, named in the act, the privilege of using his patented invention (a particular form of jetty) at Aransas Pass without the payment of compensation for such use, his motive being to have his jetty tested, since it never before had been reduced to actual practice.

Haupt prepared working drawings of a jetty and submitted them to the Aransas Pass Harbor Com-

*(28 Stats., chap. 12, p. 26.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Aransas Pass Harbor Company, which is engaged in the improvement of Aransas Pass under the provisions contained in an act of Congress entitled "An act for the improvement of Aransas Pass," approved May twelfth, eighteen hundred and ninety, is hereby relieved from the conditions of said act which require the construction of said work to be commenced within one year from the date of its approval and to be diligently prosecuted by the expenditure of at least three hundred thousand dollars per annum thereafter, and to secure a navigable depth over the outer bar of fifteen feet of water within three years after the date of approval of said act, and of twenty feet within five years from said date; and the said company is hereby authorized to continue and complete its work of improvement as set forth in said act: Provided, That work shall be resumed by the said Aransas Pass Harbor Company within six months from the date of approval of this act, and shall be diligently prosecuted to completion, and said company shall secure a navigable depth over the outer bar of at least twenty feet of water within two years from the date of approval of this act. And in the event of said company failing to resume said work within the said six months, or failing to diligently prosecute the same, or to secure a navigable depth of twenty feet of water over the outer bar within the time required by this act, then Congress may revoke the privileges herein granted in relation to said improvement.

Sec. 2. That the right of Congress to alter, amend, or repeal this act is hereby reserved.

Approved January 22, 1894.

pany; but the company, realizing that the use was experimental (since the construction had never been tested) and because of its financial limitations, informed Haupt that it was unable to proceed on such an elaborate plan. Whereupon Haupt, at the request of the company, prepared modified plans which the Court of Claims found embodied about one half of his patented construction. These modified plans consisted of a so-called reverse or ogee curve jetty. The Aransas Pass Harbor Company proceeded to build according to these modified plans. Haupt was paid for preparing the plans and supervising the construction of the jetty, of which the company built only a single curve, i. e., one-half of the reverse curve. Work was continued by the company on this curved jetty and on the removal of the remaining portion of the Mansfield jetty until 1897.

On May 28, 1898, the Senate concurred in a resolution adopted by the House of Representatives on May 26, 1898,* authorizing the War Department to prepare and submit plans and estimates for the improvement of Aransas Pass Harbor and the deepening of the channel across the bar in Aransas Pass. The board created by the Secretary of War reported

* "That the Secretary of War be, and he is hereby, authorized and directed to prepare and submit plans, specifications, and estimates for the improvement of Aransas Pass Harbor, State of Texas, and especially to make plans and estimates for the removal of the sand bar at Aransas Pass and the deepening of the channel across said bar to a depth of at least twenty feet and a width of at least one hundred and fifty feet at the bottom, so as to furnish an inlet for the passage of vessels from the Gulf of Mexico into Aransas Harbor; and report such plans to Congress, and also whether in his judgment such improvement should be made."

to the effect that two jetties and dredging were necessary, *one of the jetties to be on the line of the jetty started by the Aransas Pass Harbor Company*, and the other to be spaced some 1,200 feet south of the same.

In the meantime Haupt had called the attention of members of Congress to his patented construction and when the report of the board was submitted to the House Committee on Rivers and Harbors, Haupt, as an engineer and contractor, was requested by the chairman of the committee to submit his proposition relative to making the improvements. His proposition did not meet with approval of the committee and they rejected it, whereupon Haupt informed the committee that if the Government used his invention he would expect compensation for such use.

By the Act of March 3, 1899 (30 Stats. Chap. 425, pp. 1121, 1128),* Congress authorized the Secretary of War to contract for the removal of the old Mansfield jetty provided that the work should not be done until the Aransas Pass Harbor Company transferred to the United States all of its rights and privileges in the harbor and the jetty constructed in said harbor under the supervision of Haupt. These rights were conveyed on March 27, 1899.

* "Provided, That the Secretary of War is hereby authorized to contract for the removal of that portion of the old Government jetty in said harbor from the end nearest the curved jetty, constructed by the Aransas Pass Harbor Company, to the wreck *Mary*, in such manner as to in no wise interfere with the curved jetty now located in said harbor: And provided further, That said work shall not be let by the Secretary of War nor said work done until the said Aransas Pass Harbor Company shall have properly released and surrendered all rights and privileges heretofore granted to it in said harbor by Congress, also the jetty constructed in said harbor."

When Haupt got information that the Aransas Pass Harbor Company was going to transfer its rights to the United States he informed the company that it had no right to transfer the license which he had granted to it as it was a "personal license" and not assignable. He also informed the United States to this effect.

Subsequently Congress passed several acts (June 13, 1902, 32 Stats. 331, 340, Chap. 1079; March 3, 1905, 33 Stats. 1117, 1130, Chap. 1482; March 2, 1907, 34 Stats. 1073, 1091, Chap. 2509) authorizing the Secretary of War to continue the improvement of Aransas Pass "*in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore done.*"

The United States, through contractors, removed the old Mansfield jetty and continued the jetty started by the Aransas Pass Harbor Company. Before the United States started work on this latter jetty, it submitted its plans (which were drawn by the Army engineers) to said Aransas Pass Harbor Company, and the plans were in turn submitted to the company's engineers, among whom was Haupt, who suggested modifications which were adopted by the United States bringing the plans in substantial accord with the modified plans adopted by the Aransas Pass Harbor Company, i. e., the plans which included only a portion of the patented jetty. The United States completed the jetty started by the company, and the Court of Claims found that this completed jetty was not built in accordance with, nor did it

embody, the features patented by claimant. Furthermore, it did not produce a navigable channel. Subsequently, a second jetty was built by the Government,* which jetty was substantially parallel to and 1,200 feet from the first jetty (in accordance with the "two jetty" plans submitted by the War Department), and by the aid of this jetty and successive dredgings Aransas Pass has now become navigable.

BRIEF OF ARGUMENT.

In the following argument defendant will show:

- (1) That no contract to pay claimant compensation for the use of any design patented by him is expressed in the statutes authorizing the building of the jetty which is made the subject matter of this suit;
- (2) That no such contract can be implied either from the statutes, the actions of the congressional committees, or the action of the United States in completing the jetty started by the Aransas Pass Harbor Company; and
- (3) That the United States did not use any construction patented to claimant.

THERE WAS NO EXPRESS CONTRACT BETWEEN HAUPT AND THE UNITED STATES FOR THE USE OF HAUPT'S PATENTED CONSTRUCTION.

No express contract can be found in the statutes authorizing the continuation of the building of the jetty begun by the Aransas Pass Harbor Company by the United States, for when Congress authorized the continuation of the building of this jetty in ac-

cordance with the plans and specifications adopted by the Aransas Pass Harbor Company it did not authorize the use of Haupt's patented invention, inasmuch as *the plans adopted by said company were not in accordance with the patented invention.*

When the Government was considering the continuation of the building of the jetty started by the Aransas Pass Harbor Company, claimant appeared before the Senate and the House committees, having the work in charge, and offered to complete the work on the harbor for a stipulated sum (which he stated would include no royalty for the use of his patented invention if it were used), and informed the committees that if the contract for the completion of the work were not given to him and his patented invention were used by the Government he would expect compensation for such use (Record, p. 19, finding IX). The committees rejected his offer to complete the work and did not signify their intention to use his patented invention.

The first question before this court is whether or not, if claimant's statements to the committees that he expected compensation for the use of his patented invention if the Government used the same be considered an offer to permit its use, the subsequently enacted statutes constituted an express acceptance of that offer.

Claimant contends that when Congress authorized the continuation of the building of the jetty in accordance with the "design and specifications of the Aransas Pass Harbor Company, and in con-



(See Model.)

L. M. HAUPT.

1 Sheet—Sheet 1.

DOCK OR BREAKWATER.

No. 300,569.

Patented Apr. 3, 1888.

FIG. II.

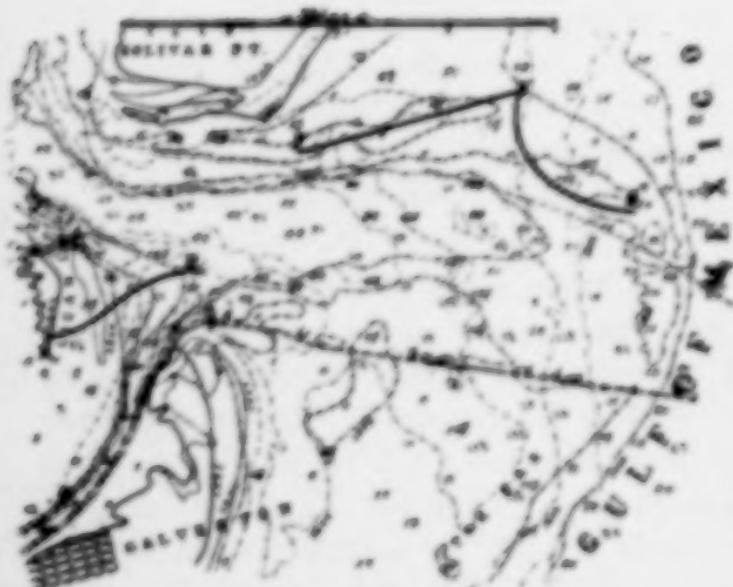


FIG. III.



S

(No Model.)

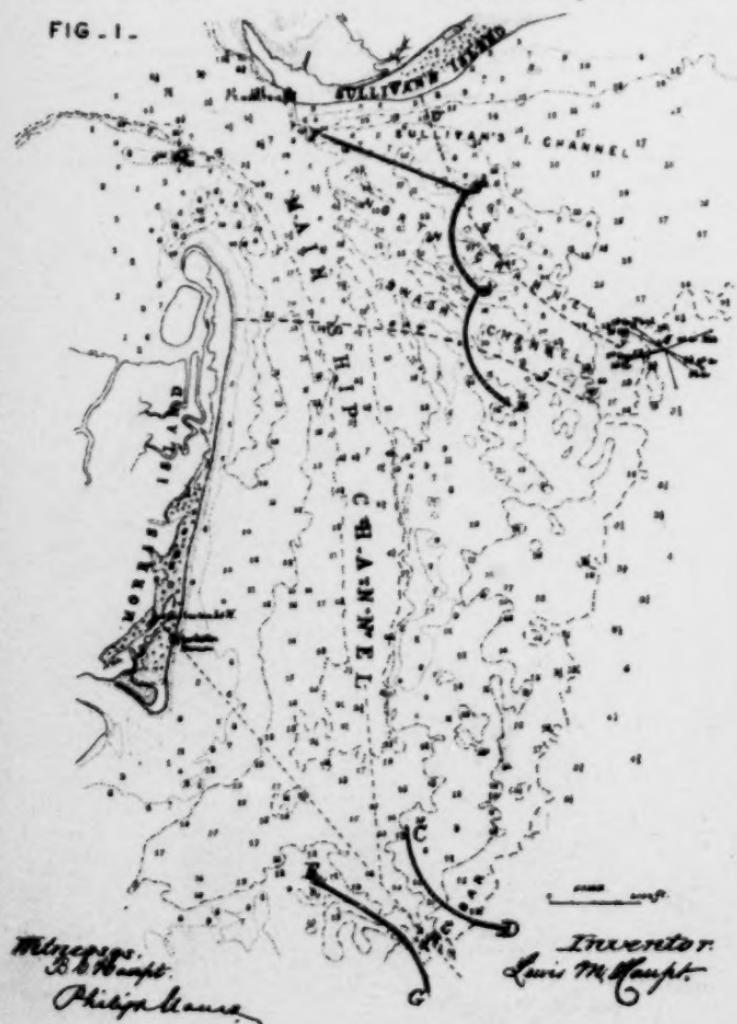
L. M. HAUPT.
DIKE OR BREAKWATER.

2 Sheets—Sheet 1.

No. 380,569.

Patented Apr. 3, 1888.

FIG. 1.—



tinuation of the work heretofore done" it accepted his offer to permit the use of his patented invention, and thereby contracted with him for the payment of reasonable compensation for such use.

This, however, is not a fair inference, as the plans adopted by the Aransas Pass Harbor Company were not in accordance with claimant's patented invention, and the Court of Claims so found, the finding being to the effect that the modified plans embodied about one-half of the patented invention (Record, page 25). Examination of the drawings, which are part of Haupt's patent and which are reproduced opposite page 13, will suffice to show the radical differences between the patented construction and that built according to the plans of the Aransas Pass Harbor Company (for which plans see cut opposite page 14). The form of the jetty shown in figure 1 of the patent drawings is utterly dissimilar to the Aransas Pass Harbor Company plans, as this form of the construction, which is shown at the upper portion of the drawing, immediately below "Sullivans Island," is made up essentially of two intersecting arcs and an inshore flank running in converging relation with the shore of Sullivans Island, but the end of which is spaced from the island, leaving an opening through which the tide is intended to flow to the inner basin. The jetty started by the Aransas Pass Harbor Company, in accordance with the modified plans which were drawn for the company by Haupt, included a single compound or S curve (as contradistinguished from two intersecting curves

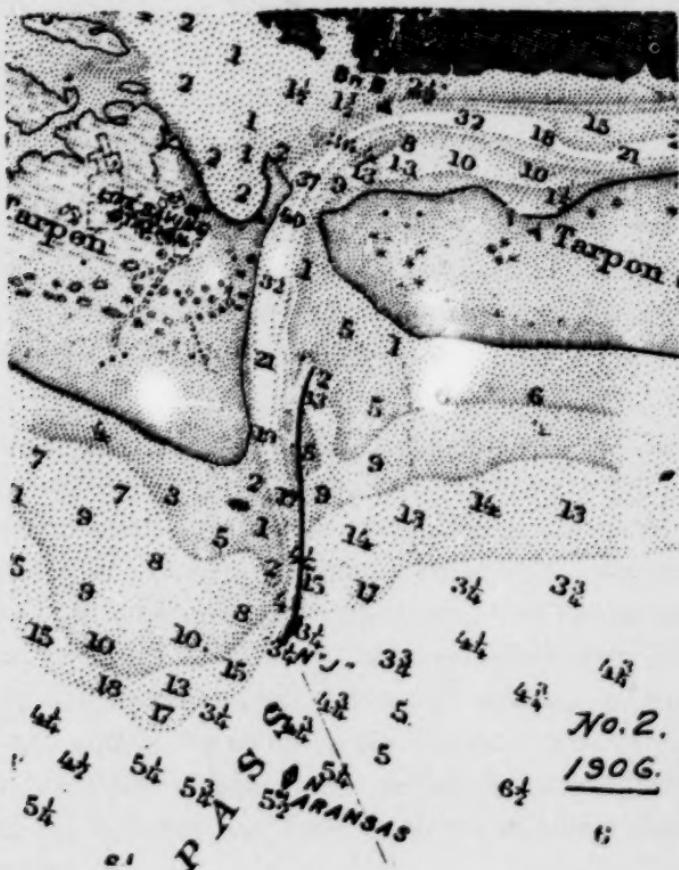
as called for in the patent) and no flank at the inshore end.

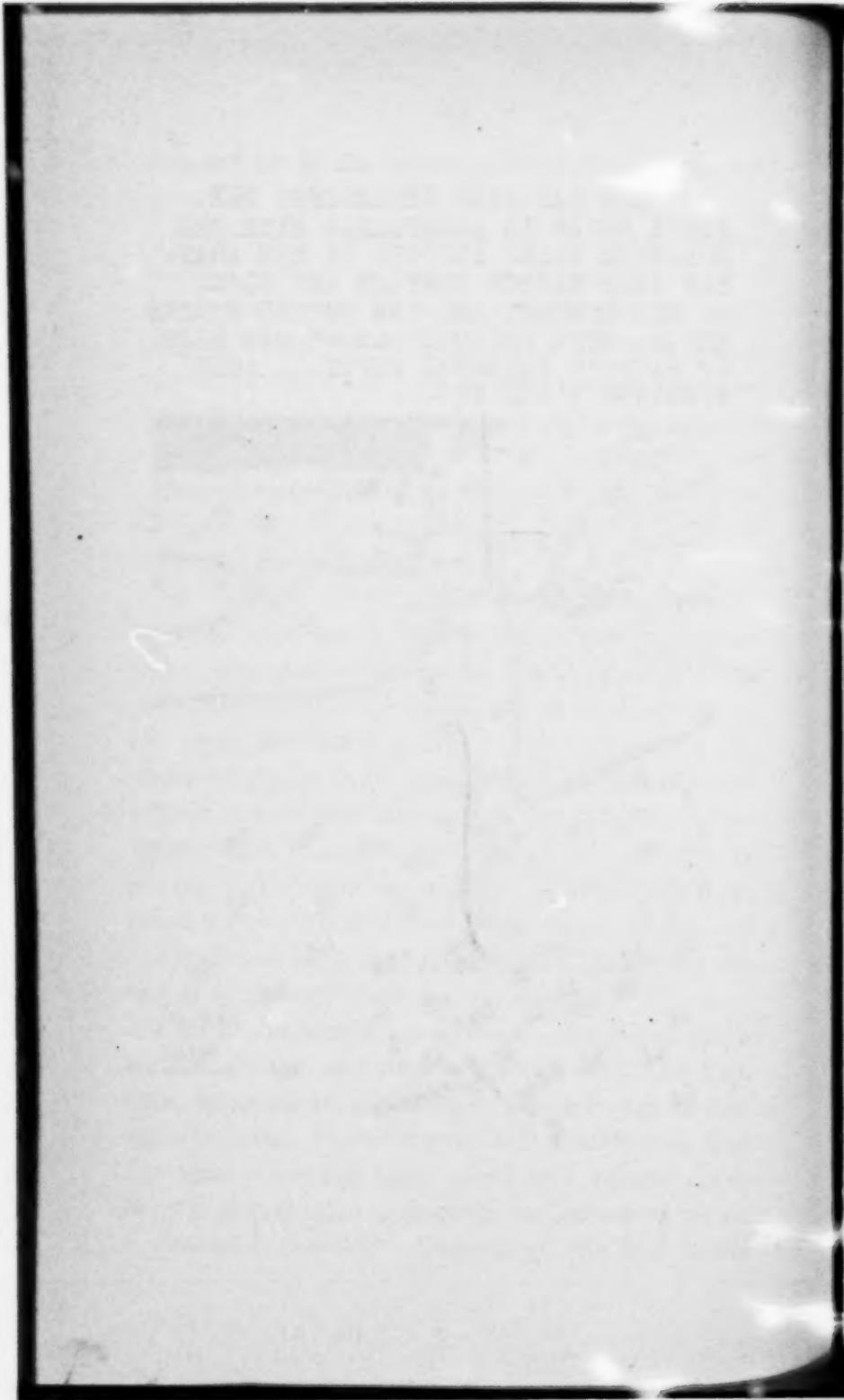
At the lower end of figure 1 of the Haupt patent drawing two spaced curves are shown, one being a simple curve and the other a compound one, their purpose being to cooperate with the main jetty (shown at the upper part of the drawing) extended from Sullivans Island "whereby the tidal currents are compressed and increased in velocity over the crest of the bar." These are supplemental constructions adapted to cooperate with the jetty shown at the upper end of this figure 1.

In figure 2 of the patent drawing the construction shown in figure 1 is modified by the omission of one of the intersecting arcs, leaving but a single curve and the inshore flank, which extends in substantially the same relation to Bolliver Point, shown at the upper end of this figure 2, as the inshore flank of figure 1 does to Sullivans Island. At the left side of this figure there is also shown what Haupt refers to in his patent specification as the dyke RD, which dyke extends from Pelican Island, being joined thereto and "cooperating with the breakwater by conserving the energy of the inner force for ebb effects."

Figure 3 illustrates a reverse curve jetty, but this is supposed to be used under different conditions than those encountered at Aransas Pass or in any harbor constructions. Haupt says of this construction that "in tidal rivers the form would be a reverse curve or ogee placed upon or near to the bar across which a channel is desired." (Record, p. 33), and in the

THE RED LINE REPRESENTS THE JETTY BUILT IN ACCORDANCE WITH THE MODIFIED PLANS ADOPTED BY THE ARAN-SAS PASS HARBOR COMPANY AND BUILT BY THE COMPANY AND THE UNITED STATES WHICH JETTY INCLUDED ABOUT ONE HALF OF HAUPT'S PATENTED JETTY. (SEE FINDINGS V AND XV).





specific description of figure 3 says that it represents a plan of reaction dyke which might be useful in the Delaware River. Distinguishing this reverse curve construction which he proposed to use in tidal rivers from those which he proposed to use in harbors, he says: "In harbors, the proper form of breakwater to secure these desiderata is one composed of a series of intersecting arcs, having their cusps or salients so placed as to cut the advancing waves and resolve them into components along the concave faces of the structure, which is intended to extend above high water." (Record, p. 32.) This construction he clearly illustrates in figure 1 of his patent drawings, where the arcs both face in the same direction, so that the "salients are placed to cut the advancing waves and resolve them into components along the concave faces of the structure."

A comparison of the patent drawings with the jetty built according to the Aransas Pass Harbor Company plans discloses the fact that the patent did not contemplate the use of a compound curve in a jetty or breakwater in harbor construction, and that the plans of the Aransas Pass Harbor Company, since they included only a compound curve and nothing more, were not within the scope of the patent. The prior art shows many reverse curve jetties similar to that begun by the Aransas Pass Harbor Company (see appendix).

Therefore when Congress, in its several appropriation acts authorized the continuation of the work

begun by the Aransas Pass Harbor Company "in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done," it clearly did not authorize the use of any design patented to claimant and the language of the statutes can not be construed to constitute an acceptance of claimant's offer to permit the use of the patented invention.

The statutes do not specifically authorize the use of Haupt's patented invention, either by referring to Haupt or to his patented construction, and for the reasons above set forth the language of the statutes can not be construed to constitute an adoption of his invention, especially in the face of the fact that neither Haupt nor his invention were mentioned in the statutes even though Haupt was before the congressional committees during the framing of the statutes.

EVEN IF THE PLANS ADOPTED BY THE ARANSAS PASS HARBOR COMPANY WERE IN ACCORDANCE WITH CLAIMANT'S PATENT (WHICH DEFENDANT DENIES), STILL THE STATUTES DO NOT CONSTITUTE AN ACCEPTANCE OF THE OFFER.

But even if the plans under which the Aransas Pass Harbor Company were operating were in accordance with the jetty patented to claimant (which defendant denies), still the statutes can not be construed as an acceptance of his offer and a promise to pay compensation for the use of his patented invention, if his statement hereinbefore quoted be construed as an offer. It is clear that Congress had

no intention to accept claimant's offer, for if it had such intention there is no reason why it should not have authorized the continuance of the building of the jetty by defendant in accordance with the plan patented to him, or, in other words, make a direct statement indicating its adoption of his patent, especially as he had already acquainted Congress with his patent. If Congress was apprehensive (as contended by claimant in his brief) that the Army Engineers would not continue the building of the jetty according to structural specifications as to measurements, degrees of curvature, etc., of the company, it could have provided, by a simple statement, for the adoption of claimant's patented design, and directed that it be built in accordance with the structural specifications of the Aransas Pass Harbor Company.

It is equally clear that Congress meant what it said in the statutes, i. e., to authorize the continuation of the building of the jetty started by the Aransas Pass Harbor Company and not to authorize the use of Haupt's invention. Behind these statutes was an obvious desire, on the part of Congress, to avail itself of the privilege reserved to the United States in the statutes enfranchising the Aransas Pass Harbor Company *; that is, the privilege of acquiring all rights that said company had in the jetty, which privilege was reserved before claimant became identified with the Aransas Pass Harbor Company or before he offered his patent to it.

* See footnote, page 5, for text.

Claimant was totally ignored in the statutes; his name was never mentioned; his patented invention was never mentioned. It is difficult to perceive, that if Congress had intended to adopt claimant's patented invention and to compensate him therefor, it would not have said so in the statutes when it is considered that Congress ultimately would have to appropriate the money for such compensation to satisfy the judgment of the Court of Claims or this honorable Court. Neither is it conceivable that Congress would have left to judicial determination whether or not it intended to and did make a contract with claimant when it had all the facts, as well as claimant and his patent before it at the time the statutes were enacted and could have, by a simple statement, made clear its intention to contract.

It may be argued that Congress was not in a position at that time to fix compensation, but that is no reason why it could not have made clear its intention to contract, since the question of compensation could have been left to a designated body (as is often done). The mere fact that Congress did not mention compensation conclusively shows that it did not intend to contract for the payment of any.

Defendant's contention that Congress did not intend to contract with claimant for the use of this patented invention, is reinforced by the fact that the Senate on May 28, 1898, before the passage of any act authorizing the building of the jetty by defendant, concurred in the resolution adopted by the

House May 26, 1898,* authorizing the Secretary of War to investigate the improvement of Aransas Pass and to report a plan therefor. This investigation was made and the Army Engineers reported that it was desirable to build on a "two-jetty plan," one of the jetties to be on substantially the location of that portion of the jetty built by the Aransas Pass Harbor Company and the other to be spaced some twelve hundred feet from it. In the light of this recommendation it was perfectly natural for Congress later to authorize the continuation of the work started by the Aransas Pass Harbor Company, for otherwise to improve the harbor according to the plan submitted by the Army Engineers would have necessitated the removal of that portion of the jetty which was built by the Aransas Pass Harbor Company and the building up of another jetty on substantially the same location. This was especially logical, since defendant had acquired all rights in the incomplete portion of the jetty. To do otherwise than to use the already built portion of the jetty would have been a useless waste of money, and since the project was exceedingly expensive and of great public importance, it was natural for Congress to avail itself of the privileges which it had reserved to the United States in the enfranchising of the Aransas Pass Harbor Company and continue the building of the jetty started by said company.

Therefore, even if the jetty begun by the Aransas Pass Harbor Company had been built in accordance

* See footnote, p. 8, for text.

with claimant's patent (which it was not), there was no expression of intention by Congress to use his invention, but only an expression of a desire to avail itself of the work which had been done by the Aransas Pass Harbor Company without regard to any rights which claimant might have had or claimed.

The language of the statutes is not open to doubt and is particularly free from ambiguity. There is no expression of an intention to contract, and the acts of Congress which have been held to constitute contracts with private parties consistently contain contractual language.

THAT CONGRESS DID NOT INTEND TO CONTRACT WITH HAUPT IS FURTHER EVIDENCED BY THE FACT THAT THE GOVERNMENT, WHEN IT TOOK OVER THE WORK OF THE ARANSAS PASS HARBOR COMPANY, ALREADY HAD A FREE LICENSE TO USE THE HAUPT INVENTION IF IT SO DESIRED IN THE CONSTRUCTION OF THE JETTY STARTED BY THE COMPANY.

When the Aransas Pass Harbor Company began to build the jetty which claimant claims to have been built in accordance with his patent, claimant granted to said company the free right to use his patented device in the building of that jetty, it being his desire and to his advantage to have an early demonstration of said device. (Rec., pp. 14 and 15, Finding V.)

When this free license was granted to the Aransas Pass Harbor Company, it appears that claimant had actual notice of the act of May 12, 1890 (26 Stat., chap. 201, 105),* enfranchising the Aransas Pass Harbor Company and the act of January 22, 1894* (28 Stat.

*See footnote, pp. 5, 7, for text.

26), extending its franchise. Even if he did not have actual notice he at least had constructive notice of the acts. In the former act the Aransas Pass Harbor Company and their associates, assigns, successors, and representatives, were authorized to construct jetties, breakwaters, and auxiliary works therefor to obtain a channel through Aransas Pass. It was provided in this act that the United States should have the right to take over such jetties, breakwaters, and auxiliary works after their completion upon the payment of the cost of the same. The act contemplated the completion of the jetty either by the Aransas Pass Harbor Company, or its assigns or successors, so that when claimant granted a free license to the Aransas Pass Harbor Company, he necessarily at the same time included the assigns and successors of said company in the license. The law being in existence at the time of the granting of the free license was as much a part of the license as if it had been written in the license itself (9 Cyc. p. 582, Chap. VIII, par. C-8, and authorities cited; 11 Cent. Digest, par. 750, and authorities cited), and if it were written in the license that the license was granted to the Aransas Pass Harbor Company, its assigns or successors, it is clear that the free license would have passed to the assigns or successors upon the transfer of the jetty to them (*Brush El. Co. v. California*, etc., 52 Fed. Rep. 945, 959, C. C. A.). Therefore, when, on March 27, 1899, the Aransas Pass Harbor Company conveyed, released, and surrendered unto the United States all of its rights in the jetty constructed in

said harbor, it conveyed with it the free right to use claimant's patented device (irrespective of whether or not it had actually used the device or, in other words, availed itself of the free license).

Claimant now contends that the United States agreed to pay to him certain compensation in consideration of his granting to the United States the right to use his patented invention in the construction of the jetty which was begun by the Aransas Pass Harbor Company and which was completed by the United States, but as the United States, as successor to the Aransas Pass Harbor Company, already had the irrevocable right to use his invention if it saw fit, the consideration flowing from him would have been a past consideration, which, as a matter of law, is no consideration at all. (*Page on Contracts*, par. 319, p. 480, and authorities cited; *Clark on Contracts*, p. 197, and authorities cited.) As there was no possibility of consideration flowing from claimant to defendant there could have been no contract, so that it is unnecessary to examine the several acts of Congress to see whether or not a contract could be implied therefrom, for even if, in those statutes, Congress had attempted to make an express contract, it would have been void for want of consideration.

If Congress had, in express language in the statutes authorizing the continuation of the building of the Aransas Pass Jetty, agreed to pay compensation to Haupt for the privilege of using his patented construction, there would still have been no contract, as

the consideration flowing from Haupt to the United States would, as above stated, have been a past consideration. The promise by Congress to pay under these circumstances would have been a mere gratuity and Haupt's relief would lie, not through the Court of Claims, since there would have been no contract, but by direct appeal to Congress itself.

Furthermore when claimant gave the license to the Aransas Pass Harbor Company he knew or it is presumed that he knew that the Government contemplated taking the work over either before or after it was finished since the statute enfranchising the company reserved to the Government such right in that jetty. Therefore, on the broad ground of public policy the license should be construed as extending to the free use of the patented invention by the Government in the completion and operation of the particular jetty. It would be against public policy to lay low the bars of conspiracy and fraud to hold that the license did not pass to the Government by operation of law, since it would permit parties in the position of claimant and the Aransas Pass Harbor Company, if so disposed, through an agreement between them, and by a partial construction of an improvement, which might practically preclude any other form of improvement, so to involve the Government as to compel it, upon the failure of the company, to pay a royalty to the patentee for the completion and use of the improvement; and especially would it be against public policy in view of the provision of the

statute in question which contemplated the use or the completion and use by the Government of the Aransas Pass Harbor Company's work.

For instance, the Aransas Pass Harbor Company might have constructed and completed the improvement with the exception of a small gap of but a few feet and then failed in its completion for one reason or another, and if the license be held not to pass to the Government, it would have no right either to use or to complete and use the work constructed by the company.

Page on Contracts, section 1120, states—

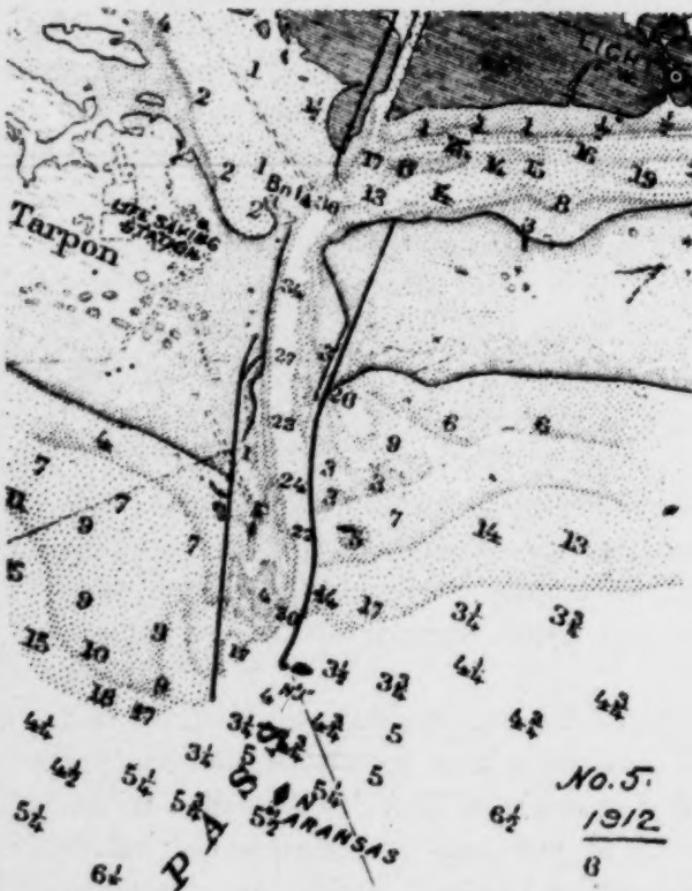
If the interest of the public is affected by a contract, it should be construed so as to protect such interest.

Most assuredly the interest of the public demands a construction of the license to the Aransas Pass Harbor Company holding it to carry with it a right to assign to the Government when the work is taken over by it.

For the two very good reasons advanced above, which are independent of each other and each of which is sufficient in itself to warrant a holding that the license passed by operation of law to the Government, we submit that the granting of the license to the Aransas Pass Harbor Company of the right to construct and use claimant's device carried with it right to assign the license to the Government or the right to the completion and use of the device by the Government without compensation to claimant.



THE RED LINES REPRESENT THE
TWO JETTIES FINALLY COMPLETED BY
THE UNITED STATES AT ARANSAS PASS.



EVEN IF THE ACTS OF CONGRESS CONSTITUTE A CONTRACT NO MONEY IS DUE HAUPT, AS HIS PATENTED INVENTION WAS NEVER USED.

Assuming *arguendo* (but not admitting it to be a fact) that Congress in the several acts appropriating money for the completion of the work at Aransas Pass authorized the use of Haupt's patented invention, the contract could only be that the United States would compensate Haupt in the event that his patented invention was actually used.

The Court of Claims has found that the jetty begun by the Aransas Pass Harbor Company and completed by the United States was in accordance with the modified plan and specifications furnished said company by the claimant (Finding XV, p. 21, Rec.), and further that the jetty so constructed did not embody any of the devices of the claimant's letters patent No. 380569, the patent in suit. (Finding XV, p. 22, Rec.)

That the finding of the Court of Claims as to the nonuse of claimant's patented construction by the United States is entirely correct, is evident upon a consideration of Haupt's patent (drawing opposite, page 13) in conjunction with the drawing of what the Government actually built (see drawing opposite page 25). The Haupt construction included, as has hereinbefore been pointed out, in harbor constructions, intersecting arcs with their cusps or salients so placed as to cut the advancing waves and resolve them into components along the concave faces of the structure. The patented structure also included a

flank which extended at an angle to the general direction of the jetty and converged with the shore, terminating, however, in spaced relation to the shore so as to permit the inflow of the tide to the inner basin. The patent does not contemplate the attachment of the jetty to the shore by any means whatsoever. The curved jetty built by the Government consisted, not of intersecting arcs with an attached flank as in the patent, but of a compound or ogee curve, the inner end of which was attached to the shore by a straight portion, thus eliminating the possibility of any inflow of the tide into the inner basin between the inner end of the jetty and the shore. Thus the Government-built jetty not only did not include the intersecting arcs with their resulting salients and their concave faces along which the waves passed after being resolved into their components by the salients, but it omitted, also, the flank and was attached to the shore to destroy the possibility of any inflow of the tide. A cursory examination of the drawing of the Government-built jetty establishes these facts beyond peradventure. Furthermore, this jetty, so built, failed to produce a navigable channel, so that it was necessary to build a second jetty spaced from the first built jetty and substantially parallel to its general direction. It was also necessary to dredge between these two jetties before a navigable channel was finally produced.

Claimant assumes a rather anomalous position in that he complains of the use of his patented invention

by the United States and for that use he alleges that \$1,250,000 is due him as reasonable compensation. In the very next breath he complains (Rec., p. 7, XIV) of the action of the Government in combining with the curved jetty at Aransas Pass a straight jetty spaced therefrom, for the reason that this straight jetty destroyed the possibility of any successful operation of the curved jetty in accordance with the theory of his patent, and therefore that he has been damaged to the extent of \$500,000. This is an absolute acknowledgment on the part of the claimant that his invention was not used, so that he is not entitled to any compensation whatsoever, even if there had been a contract such as he alleges.

DISCUSSION OF CLAIMANT'S BRIEF.

It is incumbent upon defendant to discuss claimant's brief only because of the numerous and manifest inaccuracies (doubtless inadvertent, to use claimant's expression) therein.

Claimant states (Brief p. 3, lines 19-29), in effect, that the officers of the Aransas Pass Harbor Company were impressed with appellant's patent; that he "put it (Haupt's patented design—our insert) on paper for them in the form of a reverse curve"; that he offered the free use of his plan to the company; and that the offer was accepted. The Court of Claims found as a fact that the plan adopted by the company was not in accordance with claimant's patent (Finding XV, Rec. pp. 14-15) and that the jetty as completed by the Government, defendant,

"did not embody any of the devices of plaintiff's said Letters Patent No. 380,569." It will be seen that claimant's statement is misleading.

Then, again, the matter beginning with "Mr. Haupt" (l. 3, p. 4) and ending with "the engineers" (l. 22, p. 4) is not based on the facts found by the Court of Claims.

There is no basis in the findings for the statement made in the first twenty lines of the paragraph beginning on page 6.

The matter in the paragraph beginning in line 6 on page 7 is indicative of the general inaccuracy of claimant's brief. Claimant states that in 1906 the depth of the channel *available for navigation* was over 16 feet. The finding is contrary (Finding XVIII, Rec. p. 23). The finding is to the effect that in 1906 the depth of the channel was varying, sometimes being as deep as 20 feet but *too narrow for regular navigation*, and that in 1908 the ruling depth was *6 feet*.

In the second assignment of error (p. 8) claimant states "that Congress, in enjoining the War Department to apply appellant's design in the continued improvement of Aransas Pass Harbor * * *." This is a bald misstatement of the holding of the court, for the court distinctly held that Congress did not adopt any plan patented by appellant. (Rec. p. 22, Finding XV.)

The sentence beginning in the last line of page 18 and ending on page 19 is not based on the findings of fact.

CONCLUSION.

It is submitted that defendant has shown that in the acts of Congress authorizing the continuation of the work started by the Aransas Pass Harbor Company at Aransas Pass, Texas, no contract to pay for the use of any invention patented to Haupt, the claimant, can be found in express language or in such language as to justify the implication of a contract; that no contract can be implied under the line of decisions of which *Berdan Firearms Company v. United States*, 156 U. S. 552, and *United States v. Société Anonyme*, 224 U. S. 320, are representative, inasmuch as under these decisions to imply a contract to pay compensation for a patented invention, it must be found that the Government acknowledges title to the patent in the claimant, and that it uses the patented invention under such circumstances as to indicate its intentions to pay for such use; and that the invention disclosed in Haupt's patent was not used by the Government, nor did any branch of the Government ever express its intention to use the invention of the patent.

It is respectfully urged that the judgment of the Court of Claims dismissing for want of jurisdiction should be affirmed.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

Edward G. Curtis, Daniel L. Morris, special assistants to the Attorney General.

APPENDIX.

REPRODUCTION OF EXHIBITS.

In this appendix the devices which were in existence before Haupt filed his application on which the patent in suit issued are illustrated, the location of the several jetties which include simple curves, reverse curves, and curves combined with straight portions, being shown.

(30)

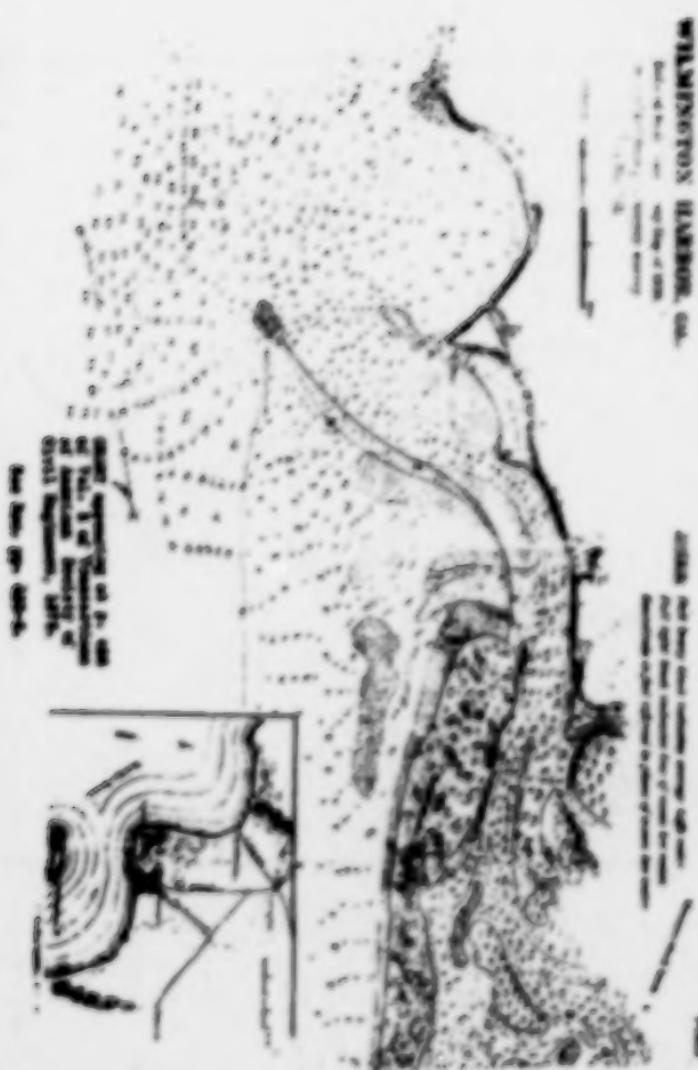


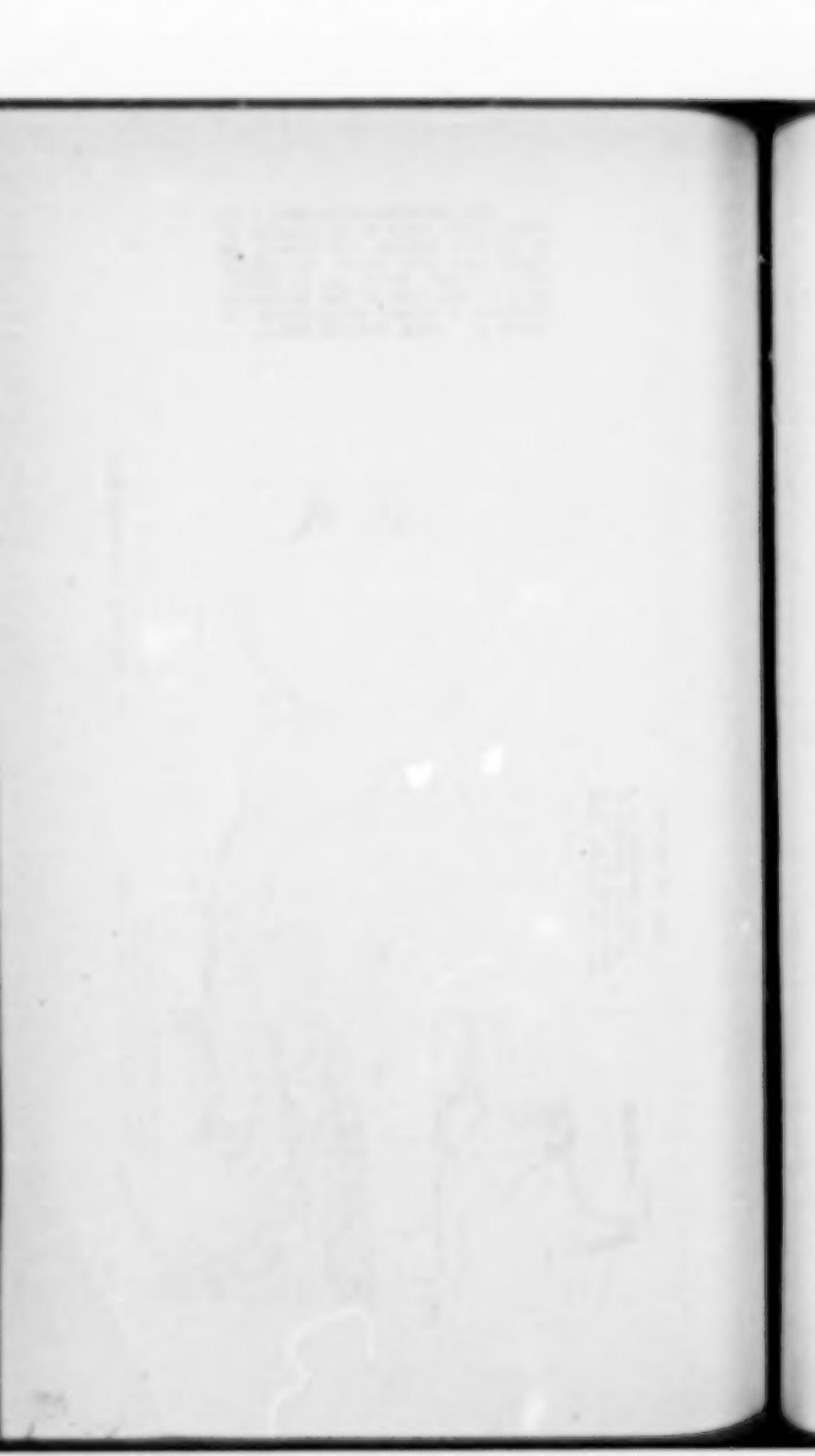
THIS DRAWING ILLUSTRATES A REVERSE CURVE DIKE OR BREAKWATER IN WILMINGTON HARBOR, CALIFORNIA, BETWEEN DEAD MAN'S ISLAND AND RATTLE SNAKE ISLAND, WHICH WAS IN EXISTENCE AT THE TIME OF THE FILING OF CLAINANT'S PATENT APPLICATION. EXHIBIT A. (SEE FILING EXH.)



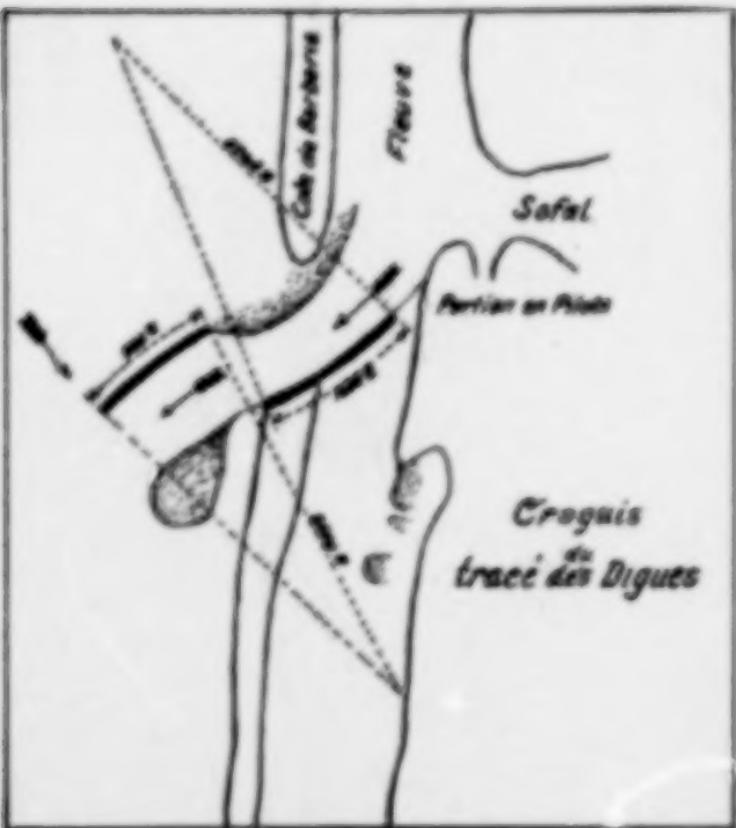


THIS DRAWING REPRESENTS A SECTIONAL CURVE DIKE OR INCLINATION IN WILMINGTON HARBOR, CALIFORNIA, BETWEEN DEAD MAN'S ISLAND AND RATTLE SNAKE ISLAND, WHICH WAS IN EXISTENCE AT THE TIME OF THE FILING OF CLAINANT'S PATENT APPLICATION. EXHIBIT A. (See Pending Suit).



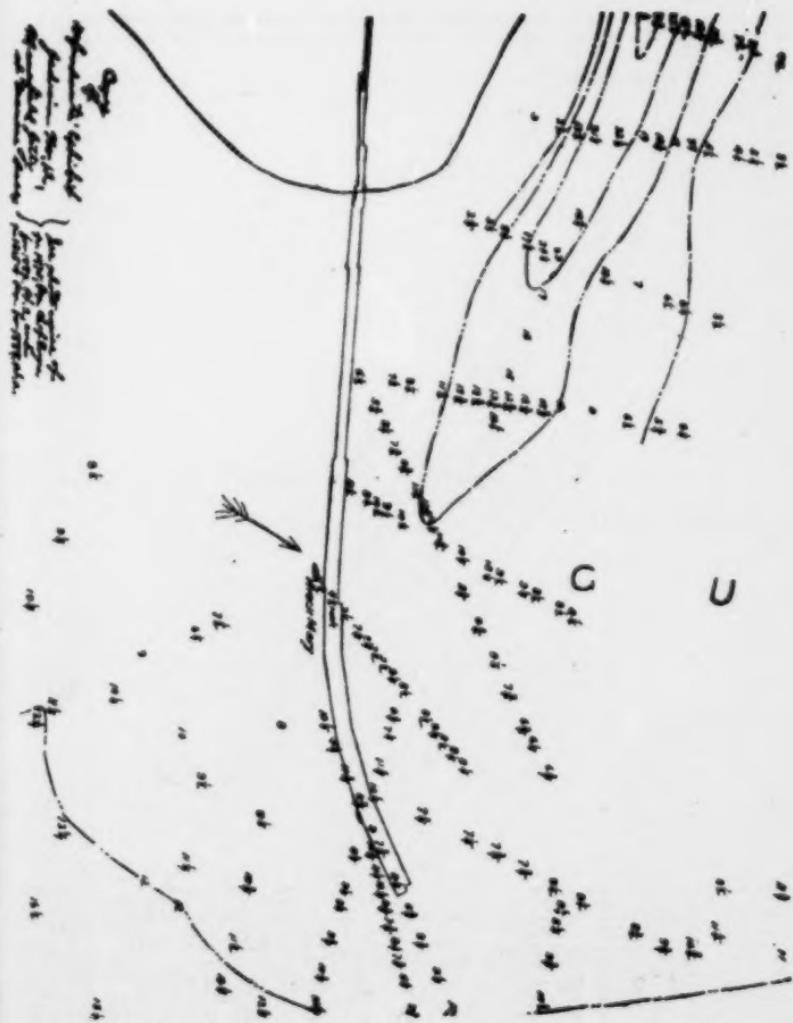


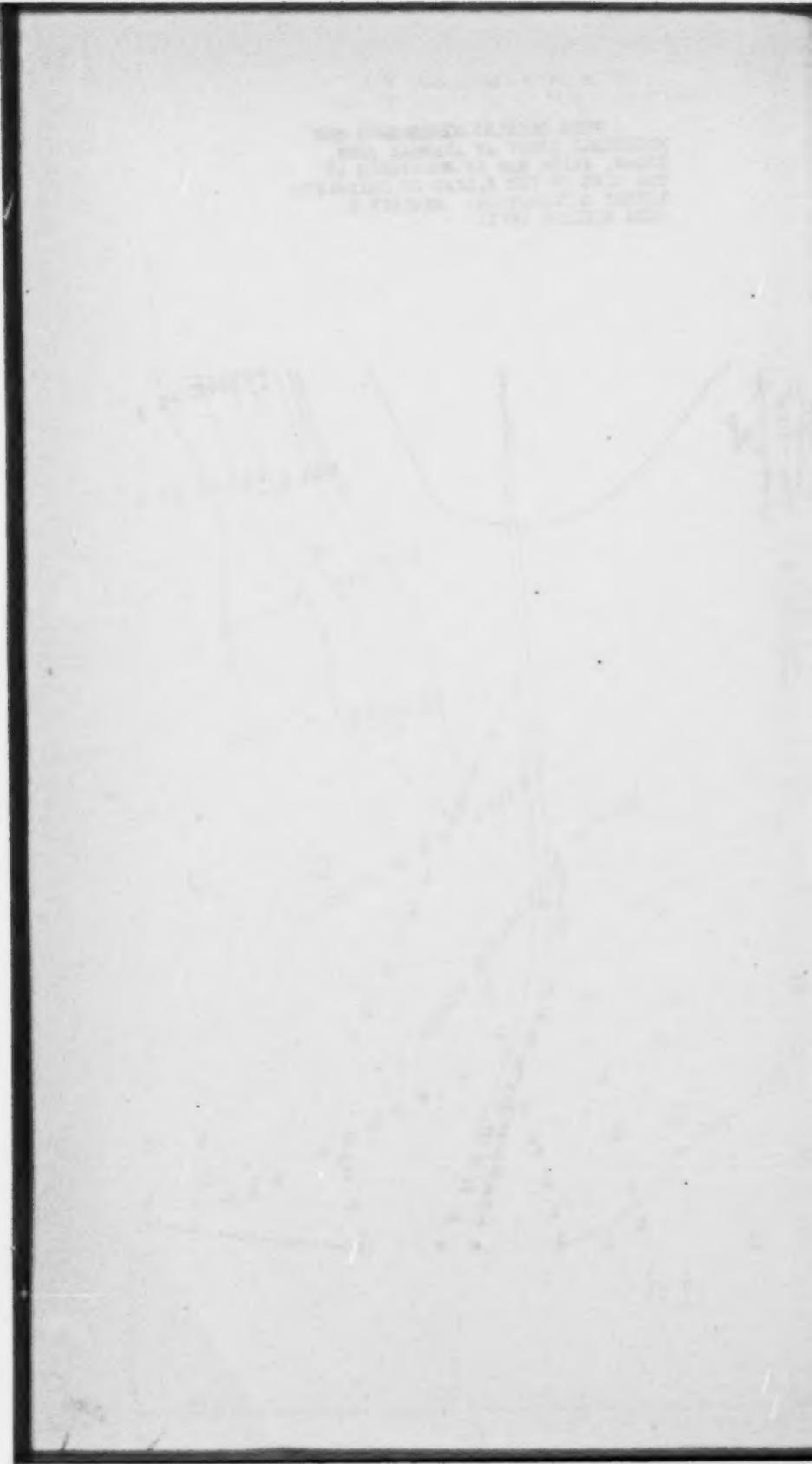
THIS DRAWING REPRESENTS CERTAIN
LAND OR PROPERTY AT BIRMINGHAM BAR,
ARIZONA, WHICH WOULD IN EXISTENCE AT
THE TIME OF THE FILING OF GLAZBURN'S
PATENT APPLICATION. DRAWN BY
JAMES P. HARRIS.



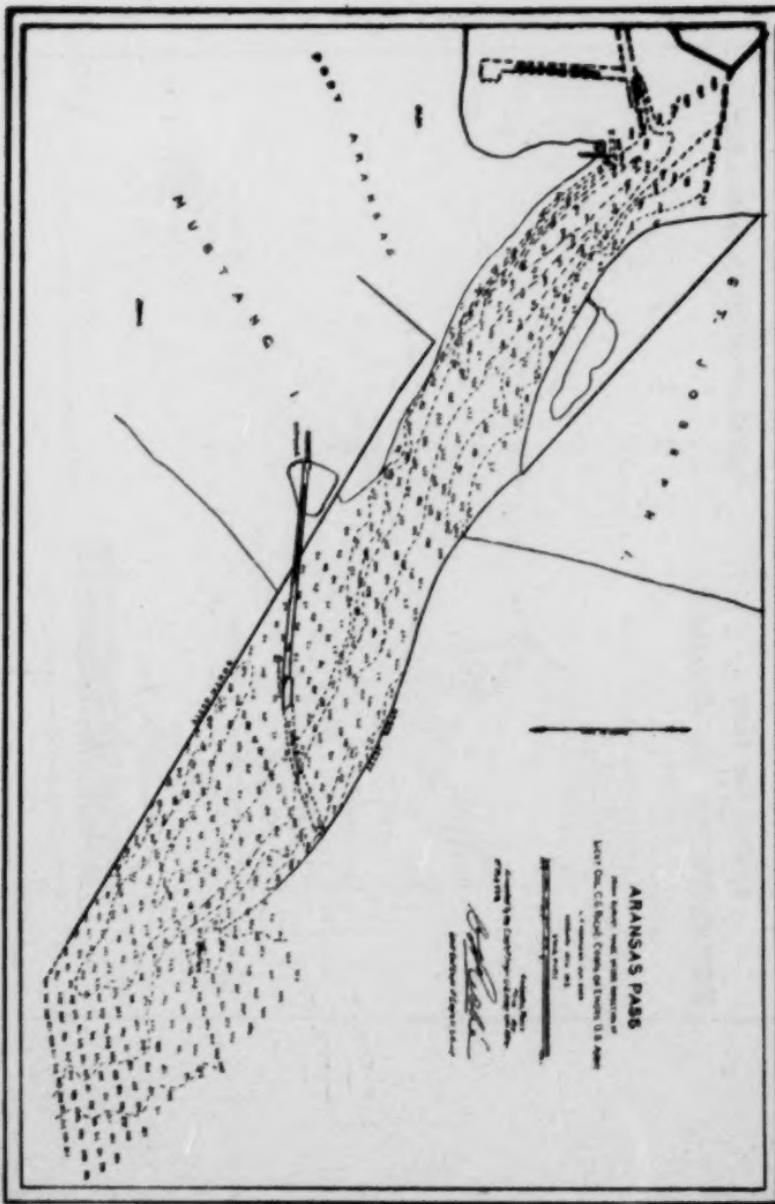


THIS DRAWING REPRESENTS THE
MANUFACTURED JETTY AT ARansas PASS,
TEXAS, WHICH WAS IN EXISTENCE AT
THE TIME OF THE FILING OF CLAIMANT'S
JACKET APPLICATION. EXHIBIT G.
(SEE PINDING XVII)





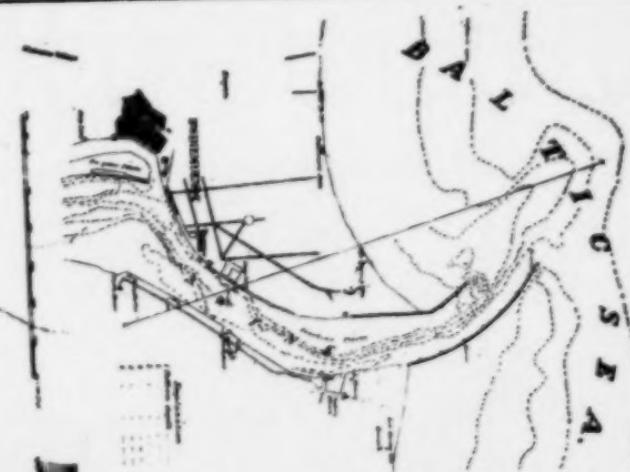
THIS DRAWING REPRESENTS THE
MANSFIELD JETTY AT ARANSAS PASS, TEX.
AS THE JETTY BEING NOTED AS "OLD
GOVERNMENT JETTY" AND THE OUTER AND
CURVED PORTIONS OF WHICH WERE REMOV-
ED TO PREVENT INTERFERENCE BY IT
WITH THE OPERATION OF THE LARIDGE COM-
PANY REVERSED CURVE JETTY. THIS JETTY
WAS IN EXISTENCE AT THE TIME OF THE
FILING OF CLAIMANT'S PATENT APPLICA-
TION. EXHIBIT D. (SEE FINDING XVII).





THIS DRAWING REPRESENTS THE CURVED DIKES OR JETTIES AT SWINEMÜNDE HARBOR, GERMANY, WHICH WERE IN EXISTENCE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. EXHIBIT E. (SEE FINDING XVII).

PLAN SHOWING JETTIES OF THE HARBOR



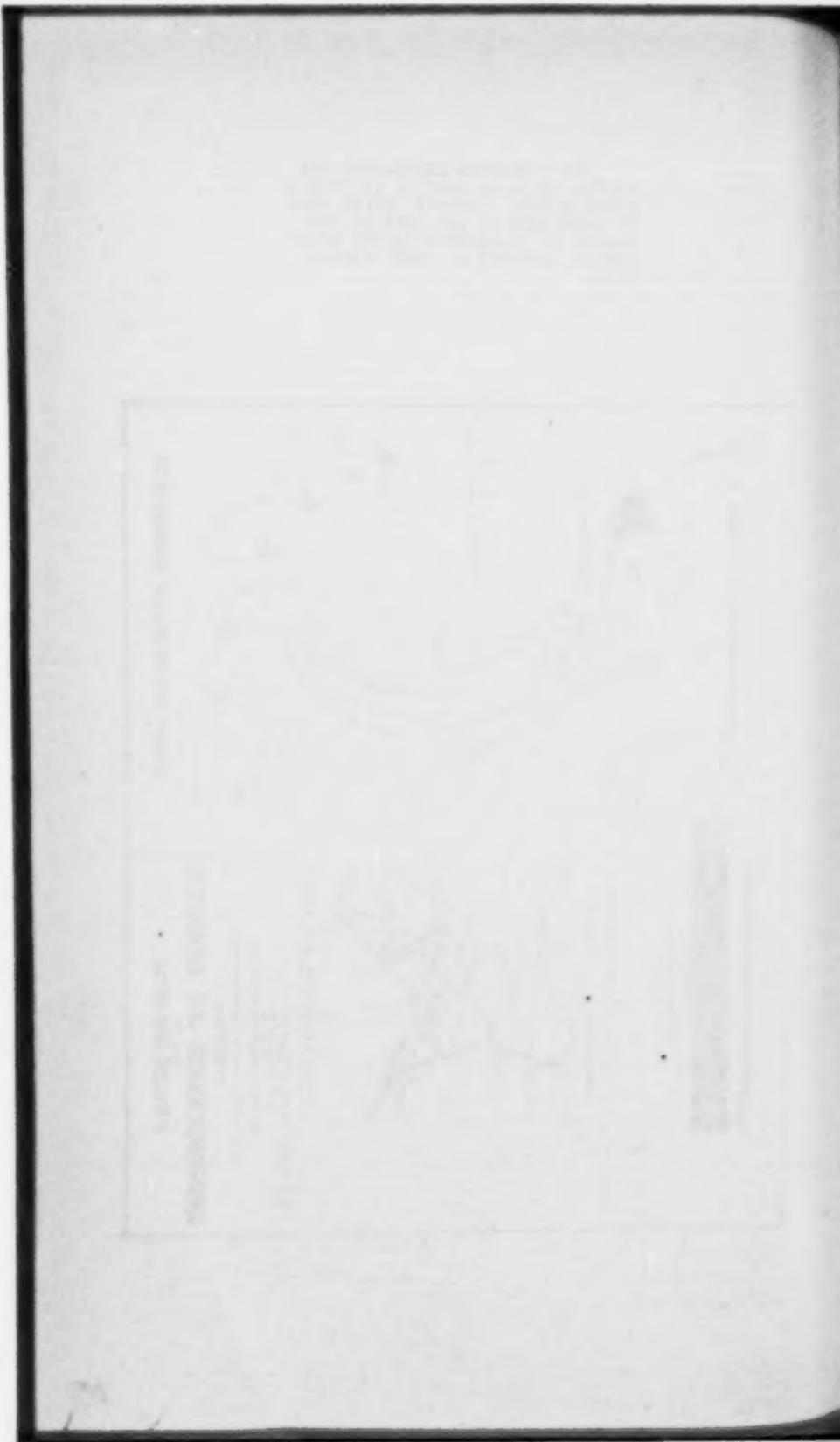
PLAN AND DETAILS
OF THE
HARBOR OF SWINEMÜNDE
PRUSSIA

ADMIRALTY ALBUM: ADMIRALTY CHART OF PORT
ON CONSULTATION WITH THE ADMIRALTY CHART OF PORT

26th May 1863
Scale 1:1000000

MAP OF STETTIN HAB' AND VICINITY





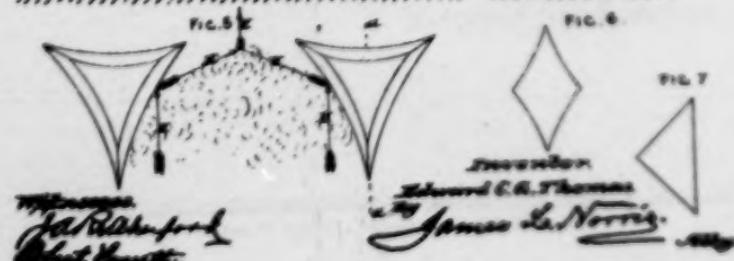
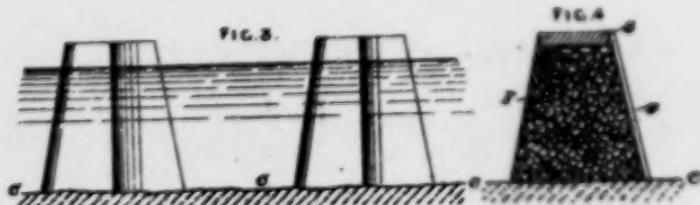
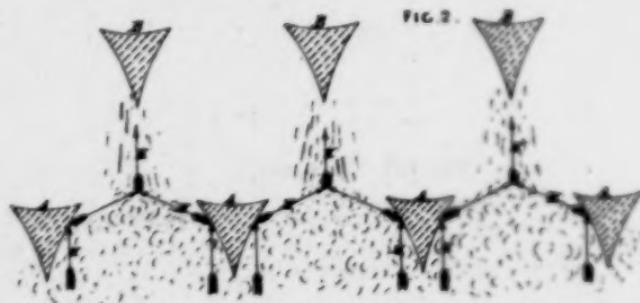
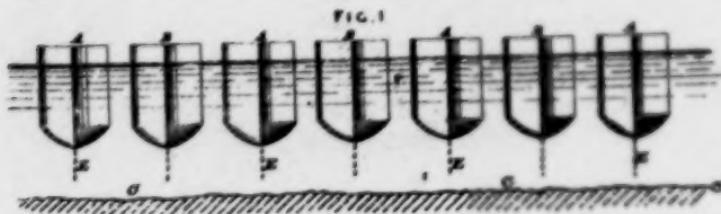
(No Model.)

E. C. G. THOMAS.

BREAKWATER.

No. 283,683.

Patented Aug. 21, 1883.



J. R. Remond
Notary.

Inventor,
Edward C. G. Thomas
James Le Morris.



FILED

NOV 15 1920

JAMES A. WALTER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 85.

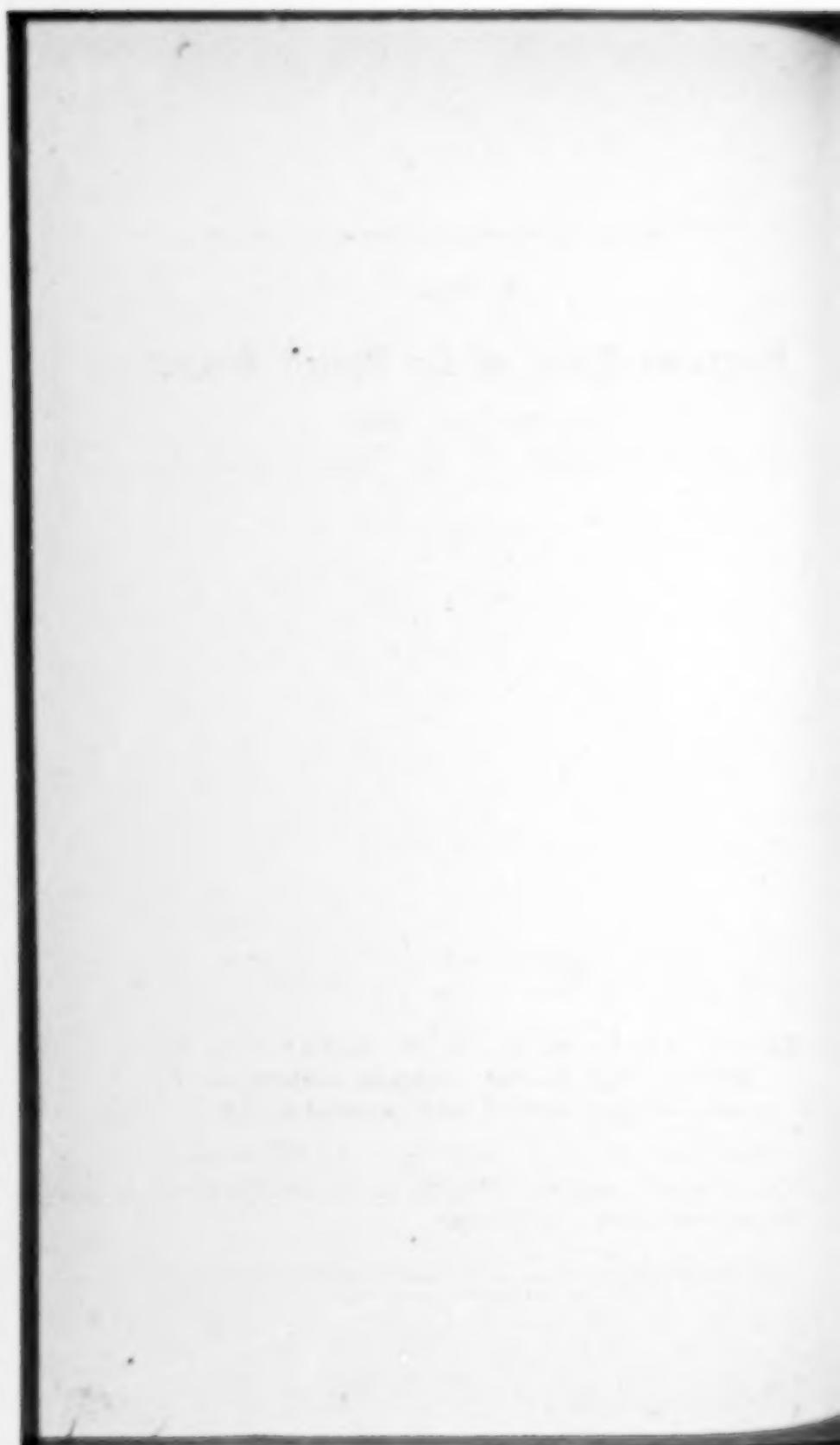
LEWIS M. HAUPT

vs.

THE UNITED STATES

REPLY BRIEF FOR APPELLANT

BENJAMIN CARTER,
Attorney for Appellant.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

No. 85.

LEWIS M. HAUPY
vs.
THE UNITED STATES

REPLY BRIEF FOR APPELLANT

This brief is filed chiefly for the purpose of making sure that, in relation to certain questions suggested by members of the court almost at the close of the hearing, the facts are correctly apprehended.

The United States did not by its dealings with the Aransas Pass Harbor Company acquire any license or other right to use a patented design

The concession given by Congress to the Aransas Pass Harbor Company (Record, p. 13) contained at the commencement this clause:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Aransas Pass Harbor Company, a corporation duly chartered under the laws of the State of Texas, and their associates, assigns, successors, and representatives be, and they are hereby, authorized on the conditions hereinafter mentioned, to construct, own, and operate such permanent and sufficient jetties and breakwaters and such auxiliary works as are necessary to create and permanently maintain, as hereinafter set forth, a navigable channel across the outer bar, which obstructs the entrance to Aransas Pass harbor. * * *."

It will be seen that the Aransas Pass Harbor Company was not created by Congress and was not an agent or instrument of Congress to accomplish an improvement such as Congress ordinarily did by direct employment, through the Corps of Engineers, of contractors. The company was created by the State of Texas for the general purpose of developing a harbor. Breakwaters and jetties were named in the charter as things which the company would have the power to construct, for which, that is to say, it might spend its stockholders' money. It had authority also to construct wharves, railroad terminals, shops, warehouses, etc. Before building jetties or anything like them in the harbor the company must needs have a permit from Congress. This permit, and nothing more, it received by the act of May 12, 1890. So far as could be derived from this concession, the only thing that could pass from the company, by its deed-in any form, is this permit.

This franchise to the harbor company of May 12, 1890, contained the following, in Section 2:

"That at any time after said improvements and auxiliary works have been completed as herein provided, and said depth of twenty feet has been obtained, the United States shall have the right to pay the said company, or their assigns, successors, or legal representatives, the value of the works constructed under this act or under or by virtue of any authority granted by the State of Texas, and on such payment being made by the United States all rights to said work on the part of said parties shall cease, but nothing in this act shall be construed as compelling the Government to take possession of and pay for said works unless so desired."

There was also a proviso in this act for a certain rate of expedition in the work, for the development of a 15-feet channel within three years and, failing these, for forfeiture or revocation of the franchise.

The supplemental act of March 2, 1892 (Rec., p. 14), extended the time for completion of the work for two years after that date and provided that upon failure therein, or of the speed prescribed, Congress might revoke "the privileges herein granted."

Clearly it was not contemplated by Congress or by the Aransas Pass Harbor Company that by this franchise the company acquired, and its assigns could acquire, any right to use a patented design. Until years later there was no thought of building a patented jetty.

Whatever rights the Government may have had under these statutes, it did not by mere virtue thereof acquire the properties of the harbor company. In 1899 it preferred to deal with the company at arms length, and it took over the properties by voluntary grant of the company rather than by sequestration. Recession was accomplished by a deed conveying to

the Government "the stone breakwater which it [the company] has constructed."

The Aransas Pass Harbor Company could not and did not convey to the United States its license to use appellant's patent.

The harbor company at any time, by native right as incidental to ownership, could have conveyed to the United States or any grantee all or any of its physical properties, and it might reconvey all privileges it had received from the United States. It could not convey to the United States a mere permit which it had received from someone else.

The deed of the company did not *purport* to convey anything more than (1) one of its physical properties, viz., the breakwater, and (2) such privileges as it had received from the Government. But if the deed of reversion had included in terms the license to use, in completion of the breakwater referred to, appellant's patent, this would have been of no avail.

The rule of law that, in absence of distinct stipulation in the grant, a license to use a patent is personal to the licensee, and so can not be assigned, is applied with peculiar strictness. It is held to bar even an assignment which occurs by operation of law. In this particular it differs from Section 3477 of the Revised Statutes, invalidating an assignment of a claim against the United States, as construed by this court. An "assignment" of a claim of this latter class by a receivership or by will, or by inheritance from a decedent, is operative. (*Erwin v. United States*, 97 U. S. 392; *Butler v. Goreley*, 146 U. S. 303; *Price v. Forrest*, 173 U. S. 410; *Goodman v. Niblack*, 102 U. S. 432.) It is not so with a patent license. A license given by a patentee to a corporation passes automatically to a

receiver who manages the company's business during its temporary embarrassment (*Schmidt v. Central Foundry Co.*, 218 F. R. 466), but not to a receiver who winds up the business of a corporation or individual; nor to one corporation which receives from another, in process of dissolution, an assignment of its properties, contracts and good-will.

Waterman v. Shipman, 55 F. R. 985;
Bowers v. Lake Superior Co., 149 F. R. 983;
Niagara Fire Extinguisher Co. v. Hibbard, 179 F. R. 844.

A license to use a patent terminates with the life of the licensee.

Oliver v. Chemical Co., 109 U. S. 75;
Haffcke v. Clark, 50 F. R. 531;
Rogers on Patents, Sec. 765, p. 1211;
Walker on Patents, Sec. 310.

A license to one partner gives no right to another partner except in so far as the latter may be regarded as the agent of the former.

Eclipse Windmill Co. v. Windmill Co., 24 F. R. 650;
Foster Hose Supporter Co. v. Thomas P. Taylor Co., 191 F. R. 1003.

Surely the United States, when completing the Haupt jetty under the recession of 1899, was not the agent of the Aransas Pass Harbor Company; and it seems equally clear that the harbor company, while operating under the franchise of 1890, was not the agent of the United States. In constructing this particular jetty, just as in its efforts to construct jetties previously planned, the company was serving its own ends, with no regard to the general interest of the

public or of the Government's fisc. The report of the Chief of Engineers for 1890 (Pt. 2, p. 1810) tells of the grant to the harbor company and points out that the project is no longer a Government concern, and the project, the *locus* even, disappeared from the reports thereafter until in 1898.

A license to one person to construct and use a patented dry-kiln does not pass to a receiver who takes possession of the premises and conducts the business even though this latter is done under orders of the court which appointed him.

Curran v. Craig, 22 F. R. 101.

It has been held that a license to manufacture and sell an article does not give a right to use the same; that the exclusive right of use still remains in the patentee (*Atwood Lock Co. v. Yale & Towne Co.*, 115 F. R. 332; *Tuttle v. Matthews*, 28 F. R. 98). Of course no more is asserted by the present appellant than that a license to manufacture and use is not assignable to another intended manufacturer and user.

If the Government acquired from the Aransas Pass Harbor Company a right to avail of the license given to the latter by Haupt, then the Government, itself the author of the patent, took in relation to the patent, in derogation of the patentee's rights, something which, to say the least, no one else could take. At one time it was contended that in granting a patent the Government impliedly reserved to itself the right to use the patented article, design or process, but no such argument would now be entertained by any court; and here the Government can not have any right which a private person in the same situation would not have.

Of course Haupt, by words or acts at the time of the decision by Congress to avail of his patent, could have

shut himself off from asserting any claim for compensation; but his mere silence would not have had this effect. Where the user knew of the patent and the patentee knew of the use and did not object thereto, the more reasonable implication is that there was an agreement for compensation *quantum meruit*.

United States v. Palmer, 128 U. S., 269.
Walker, Sec. 312.

Berdan Firearms Company v. United States, 156
U. S., 552, and other cases cited on original
brief for appellant, pp. 12-17.

This was the "Haupt jetty" after the spring of 1903, whatever it was before. At that time the Government engineer in charge, when making preparations for the new work, found it necessary to call Mr. Haupt to his assistance so that the new specifications should be substantially those under which the work of the Aransas Pass Harbor had been done (Rec., p. 19). Mr Haupt risked the jetty's success, and his own fame, on the specifications drafted by this conference. Is not the Government, in a fair sense, estopped to say it did not use Haupt's plan—did not build a "Haupt jetty"—when by availing of Haupt's skill it put accurately into effect the "design and specifications of the Aransas Pass Harbor Company?"

In this case both the real licensee and Congress were informed by the patentee on all occasions, and Congress, understood, that the patentee would expect to be paid for any use made by the Government of his patent; and there is not the slightest hint that Congress denied or doubted that his patent was already in course of use and was identified by the words "design and specifications of the Aransas Pass Harbor Co."

The later engineering report speaks of "Haupt design" or the "Haupt jetty, so-called from the name of its inventor" (Report for 1908, p. 470; House Document 5, 59th Congress, 2nd Session).

The understanding and intention of Congress (whatever they were) can be learned from testimony, referred to in the motion for remand, which has been given by Chairman Burton and Hon. John H. Bankhead, of the House Committee, and Senator Nelson, of the Senate Committee, and from officially printed reports of the committee hearings and other evidence.

Congress, when taking over a part of the property of the Aransas Pass Harbor Company, was free to say whether it would complete the patented jetty planned for, and founded by the company, or would construct some other jetty, whether involving or not involving any other patent. It was not helpless, however, to avail of the Haupt patent in case it should so elect. The Government, as a sovereign, can take and use the patented device of an individual just as it can take any of his corporeal property. The incident attaches, however, by the Constitution, that it must pay the patentee the value to it of his patent so applied.

**The Government was not in any way compelled to use
the patented design.**

If the Government had no power to avail *gratis* of the license held by the Aransas Pass Harbor Company, it could not be under any legal obligation to complete the jetty planned in accordance therewith or in any way to make use of the patent. On the Government's part it is contended that the economies of the case,

when the new twin-jetties plan was adopted in 1907, compelled the use by the latter of the completed Haupt jetty. The fallacy of this proposition is shown by the reports of the Robert board, so-called, printed in part 2 of the Report of the Chief Engineers for 1898, commencing at page 1527, and the report of the Lockwood board of date December 22, 1906, contained in House Document 5, 59th Congress, 2nd Session. The Robert board reviewed the whole history of this improvement, criticised the Haupt jetty in a hostile spirit (as the engineers of the Corps usually did), endorsed the Ernst plan of 1888 for two jetties and said that a return to that plan would require removal of only about one thousand feet of incomplete foundation of the Haupt jetty. Captain Jadwin, author of the plan of 1906, pointed out that in proceeding with a two-jetty plan it would not be necessary at the outset to disturb the Haupt jetty, and that if this latter should be necessary it could be done on lines indicated on his charts, in connection with the extension of that structure. (House Doc. 5, Sup.) Actually, not one stone of that jetty was removed nor was it ever extended one foot at the seaward end.

Identity between Haupt's (1) original and (2) reformed plans for the Aransas Pass Harbor Company and (3) the completed north jetty.

The Government's present counsel take the impression from the findings of the Court of Claims that the plan on which the construction of the north jetty was actually done—first by Clark & Co. under employment of the harbor company and then by Henry C. Ripley and Clark & Co., under employment of the Government, after the recession—was essentially different

from the original plan proposed by Haupt to the company. If the findings are ambiguous and possibly could bear this interpretation, the Robert report and the engineering reports, again, afford an unmistakable demonstration of the real fact. The Robert board, speaking of the second plan prepared for the harbor company, said that it (like the first plan) consisted of compound and reversed curves; the only change being the omission of a part of the outer (convex) curve. On this substituted plan Clark & Co., under a contract given them by the harbor company in 1895, constructed 1250 feet of complete breakwater and 2500 feet of foundation, a total of 3750 feet. The completed structure of 1250 feet was part of the convex curve—which also included 750 feet of the foundation laid. The harbor company never completed any part of the jetty except these 1250 feet. It gave Clark & Co. two other contracts, however (1895 and 1896), and they, beside partly constructing the core on the 2500 feet of foundation, laid some foundation courses outward for 450 feet, to the extremity proposed by the second plan, and 1050 feet more. This gave to the project a total length of 5250 feet instead of 6000 feet proposed by the original plan—a difference of 750 feet in the length of the outer curve. (Report of Robert board, pp. 1527, 1528; report of Captain Jadwin, House Document 5, *supra*, pp. 1, 2.)

It is true, but not important (Rec., p. 15) that Clark & Co. did not contract to *complete* and did not complete anything but a single-curve structure.

"Anticipations" of Patent.

The Court of Claims, while mentioning some structures or studies which were in existence when Mr.

Haupt got his patent (Rec., p. 23) does not say as its own conclusion that any of these anticipated the patent and does not give this court the facts necessary for an adjudication on this point. It is evident, however, that Government counsel, who contend for these older designs as anticipations, have not understood the latter correctly. Fortunately appellant had with him at the hearing a map of the Wilmington, Calif., improvement issued by the Coast and Geodetic Survey; and this shows (1) that there was a second jetty, paralleling the one exhibited, to its outer extremity, (2) that there were spurs, connecting with or separate from the jetty exhibited, to aid it, and (3) that the purpose of this particular jetty and the spurs was to prevent the shore behind it from washing away, not to create any reaction or otherwise to scour, or help to scour a channel. Moreover it appears from published statements of the engineer (Sears) who designed this jetty that it failed to accomplish its purpose, which conclusion is corroborated by the report of an engineer afterward in charge (*Transactions of American Society of Civil Engineers*, Vol. V, read September 6, 1876; *Report of Chief of Engineers for 1900*, p. 420).

The "Mansfield jetty" also referred to by Court of Claims and counsel, which consisted of a broad curve, covering a short distance, appended to a straight line, likewise was not expected to create any reaction and scour and it failed to accomplish anything useful.

Unsuccessful and abandoned experiments do not affect the validity of subsequent patents.

Deering v. Winona Harvester Works, 155 U. S., 286.

Mineral Separation Limited, etc., v. Butte Co., 250 U. S., 336 (353).

Public documents open to the Court of Claims and to this court would show (1) that the Senegal Bar, Africa, project consisted of two separate training walls on opposite sides of a river (such as Mr. Haupt disclaimed in his patent), neither of which was expected to create a channel by reaction, and (2) that at Swinemunde Harbor, Germany, there were, or were projected to be, two jetties, parallel, like those at the South pass of the Mississippi River, not applying the principle of reaction.

If it be true that in the whole world, until at Aransas Pass in the years 1899 to 1914, there never was a navigable channel created by action and reaction of currents upon and controlled by a single jetty, and that in this one instance the Government has accomplished this result by the use of a patent belonging to the present appellant, should not this court incline to reimburse him, to the extent that the facts proved or provable establish a reasonable measure of damages, for his splendid contribution to an important and complex art and his great service to his country?

Attention is invited again to appellant's motion for a remand to the Court of Claims and his motion amendatory thereof. These propose, for reference to the Court of Claims, individual questions of fact which are involved in any correct solution of the issues.

BENJAMIN CARTER,
Attorney for Appellant.

HAUPT v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 85. Argued November 10, 1900.—Decided December 6, 1900.

Appellant sued to recover a large sum of money for the use which he claimed the Government had made of his patented improvements in dikes and breakwaters in the construction of jetties, which, with dredging, had resulted in rendering navigable to seagoing vessels the channel of Aransas Pass, on the coast of Texas. Held, that the appropriation acts evinced the willingness of Congress to expend money in testing his patented devices, but no intention to pay him until their usefulness should be proved; and that no promise of the Government to pay him for the use made could reasonably be implied. P. 278.

83 Ct. Clas. 861, affirmed.

The case is stated in the opinion.

Mr. Benjamin Carter, with whom *Mr. George Ramsey* was on the brief, for appellant.

Mr. Daniel L. Morris, Special Assistant to the Attorney General, with whom *Mr. Assistant Attorney General Davis* and *Mr. Edward G. Curtis*, Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. JUSTICE CLARKE delivered the opinion of the court.

Aransas Pass is an inlet, naturally too shallow for ocean navigation, connecting the waters of the Gulf of Mexico and those of Aransas Bay and the Bay of Corpus Christi on the coast of Texas. The problem of obtaining a navigable channel through this Pass occupied the attention of the Government and of private enterprise for many

years prior to 1912, when a channel of the desired depth of twenty feet was obtained.

This is a suit instituted by the appellant, Haupt, a distinguished engineer and the patentee of improvements in dikes and breakwaters, to recover a large sum of money for the use which he claims the Government made of his invention in the construction of jetties, which, with dredging, resulted in the creating of the Aransas Pass channel in 1912. The Court of Claims dismissed the petition holding that no contract, express or implied, with the United States was shown for the use of appellant's patented invention and that it was therefore without jurisdiction.

A resume of what was done in the effort to procure the channel, which is necessary to a decision of the case, will develop the relations of the appellant to the enterprise and to the Government on which he bases his claim.

Between 1880 and 1889 the United States Government constructed what is designated in the record as the "Mansfield Jetty," 5,500 feet in length, designed to deepen the channel through the Pass,—but it had no appreciable effect on the depth of water and the work was suspended in 1889.

In 1890 the State of Texas chartered the Aransas Pass Harbor Company, a private corporation, organised for the purpose of improving the channel at Aransas Pass, and in the same year Congress authorised the company to construct such jetties and breakwaters as might be necessary to create and permanently maintain a navigable channel "across the outer bar, which obstructs the entrance to Aransas Pass Harbor." This company built the jetty designated in the record as the "Nelson Jetty," about 1,800 feet in length, which also failed to deepen the channel and was abandoned in 1893.

In 1894 another act of Congress granted an extension of time to the same company to further pursue its objects, and at this point in the history the appellant appeared

with United States Patent No. 380,569 for certain improvements in dikes and breakwaters for improving the channels of rivers and harbors.

In the view we take of the case it will be a sufficient statement of the principle involved in, and of the claims of, appellant's patent to say that the inventor aimed to accomplish results with a single jetty, of a form specially adapted to each locality, which had theretofore been accomplished only with two or more jetties. The claims are variously worded, as usual, but the substance of the alleged discovery is, that the study of the conformation of the bottom and shores of a given locality and of the prevailing currents, tidal and other, will enable one skilled in the art to so apply the principles disclosed in the patent as to give such form and location to a single breakwater or jetty that it will "cut the advancing waves" and "resist and decompose the flood resultant" in such manner that, without the aid of a second jetty or of dredging, it will scour out and maintain a channel of the required depth in a designated location.

The appellant granted a license to the Aransas Pass Harbor Company to use his patented device or design, on condition that the work should be done under his supervision, and he thereupon prepared the necessary plans and drawings for the construction which he thought would effectuate the desired result. The cost of the jetty, as thus designed by the appellant, was too great for the resources of the company and, upon request, he eliminated a portion of it which reduced the estimated cost by one-half. The jetty thus modified consisted of a reverse curve or letter S and a contract for the construction of it was let in July, 1895. Work was prosecuted vigorously until the following January, by which time it was ascertained that a portion of the first, the "Mansfield Jetty," which had been reported officially as having disappeared, was still in place and in such a position, it was claimed, as to

prevent free erosion by the currents as they had been and would be modified by the new jetty under construction. Thereupon a contract was let for the removal of a part of the "Mansfield Jetty," but in May, 1897, before the new jetty was completed or the old one removed, all work was suspended.

This suspension in the month of May, 1897, marks the end of the effort to obtain the desired channel through private enterprise, and Congress, in May of the following year, by resolution called upon the Secretary of War to prepare and submit plans for the deepening of the Pass to at least twenty feet. Six months later a board created by the War Department reported in favor of two jetties, to be supplemented by dredging. It was recommended that the northerly jetty should be located substantially upon the line of the one partially constructed by the Aransas Pass Harbor Company and the other some distance southerly from it.

While the subject was thus before Congress, appellant brought his plan for dealing with the problem to the attention of the committee, and proposed to enter into a contract to construct and maintain the desired channel for a much less sum of money than the estimated cost of the work recommended by the War Department board. His proposition was given serious attention and, although it was rejected, he was assured by members of the congressional committee that they desired to give his plan a trial,—as well they might, for, if it had proved successful, it would have resulted in a great saving to the Government in dealing with many like situations and problems.

Before any further work was done, the Aransas Pass Harbor Company conveyed to the United States the jetty or breakwater, which we have seen was constructed as designed by appellant, and Congress, in 1899, appropriated \$60,000 for dredging and improving the Pass, but with the proviso that the Secretary of War was authorized "to

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contract for the removal of that portion of the old Government jetty [the Mansfield Jetty] in said harbor from the end nearest the curved jetty" constructed by the Aransas Pass Harbor Company, but in such manner as not to interfere with that jetty. This is a plain indication of interest on the part of Congress in appellant's theory or method of dealing with the problem, for he was claiming that the old jetty constituted an obstruction to the action of the water and prevented the jetty which the Harbor Company had built under his direction from scouring out the desired channel.

That appropriation was expended and three years later, in 1902, Congress appropriated \$250,000 for continuing the improvement of the Pass, but again with the proviso "that the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore carried out on said jetty by said company."

Here again is plainly evidenced the purpose of Congress to give appellant's theory a full and fair trial, for, it should be noted, as yet it had never been reduced to actual practice.

Plans and specifications for the contract under this second appropriation were drawn by the Government engineer in charge and were by him submitted to the Aransas Pass Harbor Company and the appellant suggested amendments, which were adopted. Among other things done under this contract was the removal of a considerable part of the Mansfield Jetty which the appellant had claimed so affected the action of the currents as to prevent the obtaining of the desired results from his construction.

Three years later, in 1905, Congress appropriated a further sum of \$100,000, and in 1906 a like amount, for the improvement of the Pass and in each case the provision was incorporated that the money was to be applied to

construction "in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done."

The findings of the Court of Claims are: that in compliance with the provisions of these various acts the work of improvement was continued and completed in 1906, in accordance with the plans and specifications, as modified by appellant; that from 1896 to 1906 the depth and width of the channel were variable and shifting, with a ruling depth of only six feet of water in 1908; and that the evidence does not show to the satisfaction of the court that the so-called Haupt jetty, which was constructed under appellant's direction, "did produce, or would have produced, a navigable channel of the necessary or proper depth and width for navigation purposes."

It is upon the terms in which the three appropriations were made in 1902, 1905 and 1906, each for the construction or completion of the project "in accordance with the design and specifications of the Aransas Pass Harbor Company," that the appellant relies, and from them it is argued that a contract to pay him for the use of his design and for the impairment of his patent should be derived. But we not only have the Court of Claims finding that the experiment of attempting to procure the desired channel by appellant's method and under his plans, pursued through many years and definitely for four years, from 1902 to 1906, at an expense to the Government of \$450,000, resulted in failure, but we have the further action of Congress, next to be described, which clearly shows the correctness of the court's conclusion.

In March, 1906, as we have seen, the work of improvement according to the plans as modified by the appellant was completed without securing the required channel. In the following December, a board, appointed by the War Department to further consider the Aransas Pass project, recommended that the spacing which Haupt had left

between the end of his jetty and St. Joseph's Island, for its influence on the currents, should be closed and that a parallel jetty should be built to the south of the Haupt jetty, thus making the project one of two jetties, instead of the single jetty of appellant's plan.

In 1907 Congress appropriated \$200,000, and authorized contracts for the additional amount of \$290,000 for improving the Pass "in accordance with the plans submitted in its report of December twenty-second, nineteen hundred and six, by the Board of Engineers created by authority of [the] Act of June thirteenth, nineteen hundred and two." It will be seen that all reference to appellant's method of solving the problem disappeared from this act, which adopted the new plan of solution.

Contracts were made under this appropriation of 1907 and a second jetty, generally parallel to the Haupt jetty, was commenced in March, 1908, and completed in 1911. The Court of Claims finds: that, beginning with 1912, coastwise and seagoing vessels have been going through the Pass and that in that year the port of "Aransas Pass" was given the status of a commercial port on a par with Galveston by the Railway Commission of Texas; that "dredging was necessarily done in the years 1912 and 1915, inclusive, to maintain a proper navigable depth of channel in the pass"; and that this construction as ultimately completed "did not embody any of the devices of the plaintiff's [appellant's] letters patent No. 380,569."

It is, of course, essential to recovery by appellant on a *quantum meruit*, that he should prove a contract express or implied, on the part of the Government to pay him, that his patented method of construction was used, and what the value of it was. *Gibbons v. United States*, 8 Wall. 269; *Bell Engineering Co. v. White & Co.*, 250 U. S. 46. The three acts requiring the money appropriated to be used in accordance with the design and specifications of the Aransas Pass Harbor Company, which were prepared by

appellant, implied clearly that Congress intended to give the experimental construction of appellant a fair trial and common honesty would infer a disposition, but not a contract, to pay for the use of the patented form of construction, if it should be found to be valuable. But, saying as much as it did, the failure of Congress to say more imports a determination on its part to hold within its discretion the decision as to the usefulness of appellant's ideas and as to what, if anything, should be paid for them. The absence of any reference to appellant or to his patent and of any words implying a contract to pay him, from the three acts of Congress in which reference is so distinctly made to the specifications embodying his ideas, is unmistakable evidence that Congress deliberately dealt with appellant's theories as still in the experimental stage, and that it was willing to use the public money to give them a trial in practice, but that payment for them was reserved for consideration until their usefulness should be established,—and this, the finding by the Court of Claims shows, was never done.

For these reasons, to the sufficient finding that the construction which produced the desired channel did not embody any of the devices of the appellant's patent, we must add that the record fails wholly to show anything from which a promise by the Government to pay for the use of such devices can reasonably be implied, and therefore the judgment of the Court of Claims must be affirmed.

Being of opinion that our conclusion would not be affected by any findings to be made on the points asked for in the appellant's motion to remand for additional findings of fact, that motion is denied.

Affirmed.